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Wisconsin Supreme Court Acts on Bar Admission

THE Supreme Court of Wisconsin on June 21st, 1926, announced a complete revision of the rules for admission to the Bar of that state, effective January 1st, 1928. These new rules among other things require that the applicant must have had two years study in college or have passed examinations upon the first two years work of colleges approved by the North Central Association or accredited by the American Council on Education. This must be followed by attendance at a full time law school approved by the Council of Legal Education and Admissions to the Bar of the American Bar Association for three years of thirty-two weeks each or at a part-time law school, similarly approved, for four years of thirty weeks each, or by the study of law for four calendar years "under the personal tuition and direction" of an attorney. In the case of office study, registration prior to the beginning of the study is required, together with periodical reports on the work done as may be required by the State Board of Bar Examiners.

Incorporating the American Bar Association

FOLLOWING is an extract from a report submitted by Mr. McLeod from the Committee on the District of Columbia on April 30, 1926, on H. R. 11277, "to provide for the incorporation of non-profit, non-secret associations of a national character, formed for patriotic and professional purposes in the District of Columbia:"

"The American Bar Association, with a membership of upward of 25,000 of the leading lawyers of the several states of the Union, requires corporate power to carry on the vast functions of the Association. The power of the Association during the past forty years has been and is solely devoted to the promotion and advancement of the judiciary, the codification of our laws, the initiation of uniform laws throughout the several states, the publication of a journal in which the discussion of public measures is carried on and promulgated solely for the benefit of our country and citizenship.

"The American Bar Association and its vast ramifications devoted to the public good is maintained through small annual payment of dues by its members, and this measure will enable the association to continue its functions as a national organization with corporate identity. The Code of the District of Columbia permits organizations of a similar character for educational, religious, and other societies, but is not sufficiently broad to permit the incorporation of a law association.

"The bill fully safeguards public interests by express provisions in which it limits the functions of the corporation so that no part of its earnings, income, or funds shall inure to the benefit of any member of the association.

"This legislation has been unanimously indorsed by the association at its annual meetings, and is recommended by such eminent members of the bar as Hon. Charles Evans Hughes, Hon. John W. Davis, Hon. Robert E. Lee Saner, Hon. Elihu Root, Chief Justice Taft, Hon. Chester I. Long, all of whom have been president of the association, and the several members of the executive committee residing in different States of the Union.

"The potent influence of the American Bar Association justifies action of Congress sufficient to clothe it with corporate power to continue and extend the influence of the association for the welfare of our Nation."

The legislation in question has not been secured up to the present time, in spite of efforts by the Association's Committee, but prospects for its ultimate passage are reported to be excellent.

Chairman Hughes Appoints Committee on Legal Education

MR. CHARLES E. HUGHES, chairman of the Conference of Bar Association Delegates has appointed the following as members of the Committee on Legal Education of the Conference: Charles S. Cushing, San Francisco; Elias Gates, Memphis, Tennessee; Henry W. Taft, New York City; Guy A. Thompson, St. Louis, Missouri; Walter F. Dodd, Chairman, Chicago.

The chief duty of this committee is to encourage the adoption of higher standards for admission to the bar. The American Bar Association at its annual meeting in Cincinnati in 1921 and a special session of the Conference held at Washington in February, 1922, adopted resolutions in favor of higher standards of general education and of legal training. These resolutions constitute the guide for action of the committee on legal education of the Conference of Bar Association Delegates.

Columbia Law Review's Twenty-Fifth Anniversary

THE Columbia Law Review celebrated its twenty-fifth anniversary by a dinner at the Hotel Pennsylvania in New York on April 5, 1926. A pamphlet commemorating this interesting occasion has been received. It contains the salutatory printed in the first issue, January, 1901, the story of the founding of the Review and the various pangs and fears which attended it, a review of the twenty-five years of its existence, a list of the successive editorial boards, and also a list of the principal colleges whose graduates have been represented among the editors. The high standard which the Columbia Law Review has set and uniformly maintained amply justifies the pride felt by its founders and successive boards of editors. "It is pleasant to realize," writes John M. Woolsey, Secretary of the Review 1900-1, in the brochure referred to, "that the foundations of the Law Review were, apparently, well laid, and to see that the standard has improved from year to year and that the Review has now come, I believe, to be generally recognized as one of the two or three important legal magazines in the United States. That it has kept pace with changing conditions is witnessed by the Current Legislation Department which helps in its small way to illumine a statute-ridden world."

"The Code of Laws of the U. S. of America"

THE bill for the "U. S. Code" passed both houses at the recent session of Congress. The House Bill (H. R. 10000) passed the senate with certain amendments which were accepted by the House, among which was one eliminating the repeal provisions as passed by the House. The first amendment by the senate is also of special interest. It reads as follows:

"(1) Immediately after the enacting clause insert the following:

"That the fifty titles hereinafter set forth are intended to embrace the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925, compiled into a single volume under the authority of Congress, and designated 'The Code of the Laws of the United States of America.'

"Sec. 2. In all courts, tribunals, and public offices of the United States, at home or abroad, of the District

of Columbia, and of each State, Territory, or insular possession of the United States—

"(a) The matter set forth in the Code, evidenced as hereinafter in this section provided, shall establish prima facie the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925; but nothing in this Act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of any section of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments.

"(b) Copies of this Act printed at the Government Printing Office and bearing its imprint shall be conclusive evidence of the original of the Code in the custody of the Secretary of State.

"(c) The Code may be cited as U. S. C."

The act was approved by the President on June 30.

Organizing the Legislators

THE American Legislators' Association is one of the latest efforts to meet some of our American problems by means of organization and cooperation. The idea is to bring all the legislators of the nation, state and federal, into a common organization which may act as a clearing house of information on legislative matters and also provide cooperation in the passage of uniform laws and other sorts of legislation in which the various states have a common interest. The plan of organization provides for a local council for Congress and each state and a general assembly. The new organization will hold a meeting in Denver on July 19 and 20. Mr. Henry W. Toll, of the Denver, Colorado, Bar, is the originator of this interesting enterprise, which, according to various bulletins recently issued, has now perfected its organization under the original plan. Resolutions of the Denver Bar Association indorsing it were published on page 422 of our June issue. Similar action has been taken by the Denver Law Society and the Executive Committee of the Colorado Bar Association.

Arguments Before U. S. Supreme Court

The pages of the JOURNAL containing the Review of Recent Supreme Court Decisions were made up before the copies of the Advanced Opinions of the Supreme Court of the United States and the Supreme Court Reporter for July 1 were available. They thus do not contain the names of counsel who argued certain cases the opinions in which were handed down on June 7th. We are supplying the omission in this place. Yu Cong Eng vs. Trinidad was argued by Mr. Frederic R. Coudert for petitioners and by Mr. Paul Shipman Andrews for respondent. Frost vs. Railroad Commission of California was argued by Mr. Max Thelen for plaintiffs in error and Mr. Carl I. Wheat for defendant in error. Lake Superior Consolidated Iron Mines vs. Lord, and several other cases involving like questions were argued by Messrs. Charles E. Hughes, William D. Bailey, John G. Milburn and Nathan L. Miller, for appellants, and Mr. Patrick J. Ryan and J. Youngquist for appellees. Scott vs. Paisley was argued by Paul Donehoo, for plaintiff in error, and Walter McElreath, for defendants in error.

Back Numbers of Journal Wanted

The Editors of the Journal are extremely anxious to obtain a number of copies of the January and September, 1921, issues of this publication. The supply has been exhausted for some time and these copies are needed for the purpose of binding several extra sets for office and American Bar Association Library use. They will appreciate receiving them from members who do not intend to use them further and will be glad to pay the current price. Address: American Bar Association Journal, Room 1119, The Rookery Bldg., 209 S. LaSalle St., Chicago, Illinois.

BLOOD TESTS FOR PATERNITY

Progress of Science Based Largely on Extensive Investigations of the Subject of Blood Trans fusion—Value of Tests from Standpoint of Legal Evidence—Problem of Compelling Witness to Furnish Sample of Blood

By Blewett Lee
Of the New York City Bar

THE decision of the House of Lords in the case of *Russell v. Russell*[1] that the law of England did not permit a husband to testify as to his non-access to his wife in a suit for divorce upon the ground of adultery, he claiming that his wife's child was none of his, must have set more than one person wondering what the husband was to do next if the family continued to increase in like manner. This rule of evidence may well be a by-product of the cruelty of the common law toward bastards, who could not, for example, be made legitimate by the subsequent marriage of their parents, and could not inherit from the very man who most of all owed them subsistence. Having surrounded illegitimacy with artificial terrors, the law reacted into making it as difficult as possible to prove any one illegitimate. The fraud of putting off one man's children on another has thus been made easier of accomplishment.

The science of biology has, however, in recent years been making great strides, and very likely it will not be long before the question of paternity can be decided with confidence. With the knowledge already at hand, based largely on the extensive investigations of the subject of transfusion of the blood, in about one-fourth of the cases blood tests can determine, so surely that no self-respecting court could refuse to accept the proof, that a given man could not possibly have been the father of a certain child. In the other three-fourths of the cases the most that can now be said is that, so far as the test shows, the man could have been the father of the child.[2] There are other important medical evidences, such as the duration of the pregnancy, comparison of finger prints, the swirl of the hair growth,[3] and the responsiveness to certain delicate blood tests, such as those which show a susceptibility to certain infectious diseases, which now appears to be inheritable. Indeed, there are many human characteristics now known to be inheritable under Mendelian laws. The number of characteristics so known is increasing all the time, and it is time the courts availed themselves of this new knowledge.[3]

It should be borne in mind that the law does not require a perfect test. Human affairs must frequently be adjusted on a basis of the balance of probability—the preponderance of the evidence. At the present time the law very generally is that a child whose parentage is in dispute may be shown to the jury.[4] This is almost trial by imagination. It shows how helpless the courts are before such cases, and how valuable a scientific test would be, even if not infallible, as compared with the kind of evidence actually in use in deciding such questions. The foreign medical journals are quite united in favor of the value of blood tests in determining paternity,[5] although there has been one dissentient in the United States on the ground that a mistake might possibly occur, reasoning on Mendelian principles.[6]

The important treatise upon the subject is "L'individualite del sangue," etc., by Professor Leone Lattes (Messina, 1923), more serviceable in the German translation by Dr. Fritz Schiff, "Die Individualität des Blutes in der Biologie, in der Klinik und in der gerichtlichen Medizin" (J. Springer, Berlin, 1925), to the pages of which reference is made by the figures in parenthesis in the following paragraph. Added by Dr. Schiff to the German translation is an appendix in regard to the use of such tests in legal proceedings, and an elaborate bibliography.

From this treatise we learn that where mother and child belong to one of the four groups having certain characteristics of the blood, in about one-fourth of the cases definite conclusions can be drawn as to the relationship of the father (86). The test is very important, but not always absolutely decisive (97). In civil cases in Germany persons cannot be compelled to take the test (appendix, 180). This refusal must be attributed to bad faith, as the pain of drawing the blood from the lobe of the ear or the tip of the finger is insignificant. In criminal cases, also, submission to the test cannot be compelled. The author points out the importance of the test where there is a question in regard to the substitution of children (183). The blood tests cannot prove that a certain man was the father of the child, but in the cases indicated proof can be made that he was not. The probability is great (185). In some cases all investigators would agree that the relationship of parenthood did not exist (188). The most important use of the test appears to be in bastardy

1. (1924) A. C. 687. See criticism of this doctrine in 4 Wigmore Ev. (2d Ed.) sections 2063-4, and generally 73 Univ. Pa. L. Rev. 71-74 (Nov. 1924).

2. Presumptive Evidence in Paternity test, by L. Nurnberger, Zentralblatt für Gynäkologie 49:1409-1431 (June 27, 1925), abstracted in 84 Journal American Medical Association, 636 (Feb. 21, 1925). See also Proof of Paternity by E. Wolff, 86 Hygeia 897-917 (Swedish), abstracted in 84 Journal American Medical Association, 636 (Feb. 21, 1925). Another article by B. Lindberger is in 87 Hygeia 164-176 (March 15, 1925). On the use of other Mendelian traits see 1 Wigmore Ev. (2d Ed.) section 165. He considers it premature (1923).

3. See generally "Heredity in Relation to Eugenics" by Charles B. Davenport (Holt, 1910) and the Bibliography of Eugenics by Samuel J. Holmes, 25 University of California Publications in Zoology at pp. 107 to 184.

4. Admissibility of Evidence of resemblance where paternity is in issue, by Otto Charles Deering, 11 Cornell Law Quarterly 390 (April, 1926), 1 Wigmore Ev. (2d Ed.) section 166.

5. See, for example, comment by G. Strassman on Zielki's article, 3 Klinische Wochenschrift 2195 (Nov. 25, 1924).

6. For the controversy between Ottenberg and Buchanan, see Journal American Medical Association, Vol. 77, pp. 682 and 1900 (1921); Vol. 78, p. 873 (1922); Vol. 79, p. 2137 (1922). Attention is called particularly to the article in Vol 78, p. 873, for a clear statement of the results of scientific investigation of the subject. As to the merits of the controversy, in a lecture on "Some possible bearings of Genetics on Pathology" (1922 Middleton Goldsmith Lecture, New York Pathological Society, Reprint 83673, N. Y. Acad. Med.) Professor Thomas H. Morgan, of Columbia University, than whom perhaps no one is better qualified to speak, says: "As Ottenberg pointed out in 1921 the evidence might be used in certain cases to determine the parentage of the child. Since this statement has recently been disputed by Buchanan, *from an entirely wrong interpretation of Mendel's principles.* I should like to point out that on the Mendelian assumption of two pairs of factors all the known results are fully accounted for." (Pp. 15-16.)

A clear and excellent review of Ottenberg's work will be found in an article by Professor Roger Durois in 30 Bulletin des Sciences Pharmacologiques 90 (1923).

cases where the defendant sets up as a defense the *exceptio plurium*. It must be borne in mind that in such cases there are usually other proofs which can be of assistance in reaching a conclusion. He concludes, "We now, at least in a part of the cases, can draw conclusions with a certainty which hitherto no other medical method has secured" (190).

The most available source of information for American lawyers would probably be an article by Dr. Reuben Ottenberg,[7] entitled "Hereditary Blood Qualities." The author points out that the character of the blood is permanent throughout life, and that human beings fall into certain definite groups whose blood is marked by specific substances which are inherited according to Mendelian laws. The red blood cells in a previously smooth emulsion will ball together into shapeless, tough little masses, visible to the naked eye, when mixed with serum from another human being belonging to some of the other groups. "In practice," he says, "of course, it may be difficult to obtain the consent of all three parties (or at times four), to the blood test. The test can be easily done with a few drops of blood obtained from a painless prick with a small needle. Considering this, and the importance of the questions often at issue, it seems as though some legal means could be devised by which the persons concerned could be compelled to allow the examination at the hands of a representative of the court."[8] The same author says elsewhere, "Knowing the children and one parent, one can sometimes state what the other parent must be."[9]

The important question, of course, is when, if at all, a witness can be compelled to furnish the necessary drop of blood, which is a question of privilege. That an answer will subject a person to disgrace is no longer a protection from testifying, except in one or two jurisdictions.[10]

Requiring a witness to give a drop of blood for use as the basis of evidence in a judicial investigation is a mere bagatelle compared to what the courts constantly require. A witness whose flight is feared will be put in prison, and even in some cases denied bail. A plaintiff in a personal injury suit will be compelled to submit to physical examination. If paralysis is claimed, tests will be applied of the plaintiff's sensitiveness to pain. If for the purposes of a judicial inquiry a witness may be put in prison or subjected to physical pain, or required, within reasonable limits, to exhibit a wound or disfigurement of the body to the jury,[11] surely a specimen drop of blood may also be required. The greater must include the less. If a plaintiff claimed to have been infected with a disease and an examination of the blood would show whether or not the disease existed, could not such examination be required by the court on behalf of the defendant? Suppose that the existence of Bright's Disease was involved in a legal proceeding, could not the court require a proper specimen for chemical analysis? If tuberculosis was in issue, could not the court require sputum to be furnished for microscopical examination? The court can require a finger print to be taken.[12] There can be only one answer to these questions. What a trifle the necessary drop of blood is when compared to the procedure under the writ *de ventre inspiciendo*, under which there could be not only examination of the person but imprisonment as well! Are these not the same courts which once ordered people to trial by ordeal and trial by battle?[13] Has a drop of blood grown too great for them?

There can be no honest objection to furnishing a drop of blood, and no innocent person would ever object to giving it. Even if a court should be weak enough not to require a drop of blood to be given, the refusal of the party to furnish it is in the nature of an admission of guilt, and in civil cases the other party would be entitled to comment upon it to the jury accordingly.[14] But in divorce suits on the ground of adultery where, as we have seen, the mouth of the husband is stopped by an artificial rule, the value is evident of the blood test itself. The mere right to criticize the refusal is obviously inadequate, nor could it be expected that such an admission by conduct would be sufficient to overcome the presumption of legitimacy.[15]

While in the earlier cases physical examination of the plaintiff by means of the X-ray out of apprehension that some injury might result from such treatment was not required, in the later cases the courts have not hesitated to require the use of the X-ray.[16] The only case found deciding the present question is *Hayt v. Brewster Gordon & Co., Inc.*[17] In this case it was held that under Section 873 of the New York Code of Civil Procedure, as amended in 1893, by which a physical examination may be required, the court has power to authorize the examining physician to take a sample of the plaintiff's blood for the purpose of examination and analysis. In view of the fact that the order of the court below to the contrary was reversed, the case had careful consideration, and indeed the opinion is quite convincing. The suit was one for personal injuries. The court points out that furnishing a drop of blood is much less offensive than many other things which become necessary in physical examinations as, for example, the insertion of instruments. Since the correct doctrine is so plain upon principle and what authority can be found is in accordance with it, it is not too much to hope that the great advance recently made in our information as to the nature of the blood and its inheritable quality will henceforth be used to aid in the solution of the problem of paternity, one of the most difficult which ever comes before a court.

Although, according to the text above cited, in Germany a person cannot be compelled to furnish a drop of blood for examination, as we have already seen, this is not the case in this country, for the right to have a physical examination includes the right to have a drop of blood for examination where it is material. In civil suits involving adultery the privilege of refusing to testify where adultery is a criminal offence is recognized on behalf of a party who would otherwise be compelled to testify against himself.[18] Attention is called to the fact that where a person claiming the privilege is not required to do anything but furnish a drop of blood, this is not requiring him to testify, but is nothing more than a physical examination like examining the face of an accused person or measuring or photographing him or taking his finger

7. 6 Journal of Immunology 363 (1921). See also Note 6.
8. 6 Journal of Immunology 385.
9. 79 Journal American Medical Association 2139 (Dec. 23, 1922).
10. 2 Wigmore Ev. (2d Ed.) section 987.
11. See generally 4 Wigmore Ev. (2d Ed.) sections 2216, 2220.
12. 4 Wigmore Ev. (2d Ed.) section 2265.
13. Thayer, Preliminary Treatise on Evidence, Chapter 1, pp. 34, 39. Trial by Ordeal (including Wager of Battle) 28 Jurid. Rev. 70 (1926). It is interesting to note that trials by ordeal and by compurgation are still in use in Arabia, 42 Law Quarterly Review 271 (1926), reviewing "Bedouin Justice" by Austin Kennett, Cambridge University Press 1925.
14. 1 Wigmore Ev. (2d Ed.) section 280.
15. 5 Wigmore Ev. (2d Ed.) section 2527.
16. 13 Calif. L. Rev. 272-4 (1925); 24 Mich. L. Rev. 418-420 (Feb. 1926).
17. 199 App. Div. 68 (N. Y. 1921). Original decision in 189 N. Y. S. 907, reversed in 191 N. Y. S. 176.
18. 4 Wigmore Ev. (2d Ed.) section 2257, paragraph (2).

prints or requiring him to make specimens of handwriting. A medical examination is not a violation of the privilege.[19] What is required of the witness is not testimony but physical inspection, something in the nature of real evidence.[20] While there are decisions which carry the protection of an accused person to an absurd extent, there is plenty of authority for the intelligent doctrine that so long as the accused is not compelled to testify, the examination of his body is permissible. In short, the requirement of a drop of blood for the purpose of ascertaining paternity is within the legitimate province of the court either in civil or in criminal cases, and should be made whenever the ends of justice make a blood test desirable.

It may be added that the blood test is actually in use in the German and Austrian courts today. In a recent article, also by Dr. Fritz Schiff,[21] we are told of more than a dozen cases in which it was applied there. In ten of these the blood of man, woman and child was tested, and in two cases definite conclusions were reached.[22] The cases cover a period of two years. In this article Schiff concludes that the peculiarities of the blood are constant, that they are inherited without exception under Mendelian laws, and that the results obtained justify the highest confidence. He points out that the test must be used as an addition to the other evidence available. It cannot prove who was the father—only that a certain man possibly was or could not possibly have been the father. He looks forward indeed to a great increase in our ability to identify fatherhood as our knowledge of the laws of heredity increases.

New York, June 1, 1926.

19. 4 Wigmore Ev. (2d Ed.) section 2265.
20. 2 Wigmore Ev. (2d Ed.) section 1150; 24 Mich. L. Rev. 617 (April, 1926).
21. "Die Blutuntersuchung bei strittiger Vaterschaft in Theorie und Praxis," 7 Deutsche Zeitschrift für die Gesamte Gerichtliche Medizin 360 (1926). An Associated Press dispatch of March 11, 1926, from Vienna is as follows: "For the first time in Austrian legal history, a scientific blood test has been accepted by a court as conclusive evidence in determining the paternity of a child. A Vienna judge ruled today that a young engineer was not the father of the child in a case brought by an unmarried woman for alimony. The court accepted the testimony of scientists that the defendant's blood was in 'group four,' the child's in 'group three' and the mother's in 'group two.' A similar examination has been ordered in another case."

On April 9, 1926, a report appeared in the daily press that at Chicago in a suit brought by Mrs. Marcella Callahan Modell against Rudolph Modell for separate maintenance for herself and child, a blood test for paternity had been requested by the defendant in his cross bill.
22. Page 371.

THE PRICE OF JUSTICE

Importance of Decreasing the Cost of Production of Justice—Duty of Bench and Bar to Help Cut Down the "Overhead"—Justice That Comes Too High Is Justice Denied—Proper Distribution of Expense Among Parties Litigant

By H. H. NORDLINGER
Of the New York Bar

"I HAVE discussed your client's claim with Mr. Jones with a view to obtaining a settlement. I have proved that every reason Mr. Jones gives for declining to settle the claim is unfounded. Nevertheless, he flatly refused to make a settlement.

"In my opinion, your client's claim is well founded in law. As I have already written to you, however, I do not believe that the amount of the claim is large enough to justify the expense of litigation. I need not tell you that the outcome even of a well-founded lawsuit cannot be predicted with certainty; and in this case, even if the outcome is favorable, the expense would be so great as hardly to justify the effort, from the client's point of view. My advice to the client would be to drop the claim, and write the amount off to profit and loss."

The foregoing is a paraphrase of a letter received from an able young attorney in one of the larger American cities. The bona fides of this advice cannot be doubted, for the claim was forwarded to this attorney on the understanding that he was to receive no compensation for his services unless he either made a settlement or brought suit. The controversy was a business dispute without extraordinary complications. The amount involved, while not tremendous, was substantial—$500. Unjust deprivation of this amount is a real burden to anyone, and to some may be a serious one. Yet we have here a situation where there is no effective way of preventing that unjust deprivation—the cost of doing so is greater than the cost of submitting to injustice.

To suppose that justice can be obtained without paying a price for it is just as great a fallacy as to suppose that food, or shelter, or clothing can be obtained without paying a price for it. To produce houses, or clothing, or food, labor and capital must be contributed; and someone must pay the cost of the labor and of the capital, either the person who enjoys the benefit of the product, or someone else. Payment of the price is unescapable. The only questions are, first, how economically the work of production can be carried out—that is, how much the price can be kept down by efficiency and ability—and, second, who is to pay the price. Similarly, the practical attainment of justice requires labor. There must be some tribunal—a court, an arbitrator, an umpire or a jury—which contributes work to the solution of the controversy, if there is a controversy, or to the enforcement of the right, if there is none. To do this work well requires time, labor and mental and moral qualities of a very high order. The individuals contributing it must either be paid the value of their contribution, or must make it at a loss to themselves, and so pay part of the cost themselves. Then there must be someone to present the contentions of the respective parties in a form intelligible to the tribunal which is to decide the controversy. To do this well

requires time, labor, ability, energy, skill and training. The parties must either do it themselves or hire a lawyer to do it for them. The fact is that although every one has a legal right to prosecute or defend a lawsuit in person, the actual exercise of that right is so exceptional as to show that it is cheaper in the end to hire an expert to do this work than to do it in person; and that in arbitrations, where the presence of counsel is not encouraged, and even in trials before trade associations where the presence of counsel is actually prohibited, parties do hire professional assistance in the preparation of their cases where the issues involved are of any real importance. And even if the parties do the work of preparation and presentation entirely without professional assistance, they must contribute their own time, labor and skill, so that the cost is merely transmuted from one form to another.

The Troll-King in Peer Gynt taxes the human race with being incapable of realizing the actuality of anything "that their fists cannot handle." Justice is not tangible to the senses, but the cost of producing it is just as real, and just as inevitable as the cost of producing physical goods. It is idle to say that justice ought to be free, for as long as tribunals are human, and human toil is required to present and decided controversies, justice will have a cost, which must be paid by someone. The only questions are, first, how much that cost can be cut down by more economical methods of production and, second, who shall bear the cost. And these are questions of tremendous importance in the practical administration of justice. They have not been given the attention they deserve.

It is undoubtedly true that there are disputes so trivial that it is better both for society and for the disputants that they remain undecided; but there are many disputes which are not trivial, the expense of resolving which is nevertheless prohibitive. Justice is a great desideratum, both for society and for the individuals concerned; but even justice may cost more than it is worth. It is inherent in the nature of things that there must be a point below which litigation is unprofitable; but it is to the interest of everybody, *including the lawyers*, that that point should be as low as possible. It is the business of the law not only to do justice, but to do it as economically as possible. In the long run the practitioners of law will not lose, but gain, by such economy; just as in the long run business does not lose, but gains, by economical methods of production.

Our law gives a great deal of attention to doing justice, but very little to doing it economically. To a very great extent it ignores the extent to which economic factors affect the product itself. We have all become familiar with the phrase "Justice delayed is justice denied." We need to remember, too, that justice at prohibitive expense is justice denied. I heard a case tried in the Municipal Court about three years ago in which one woman was suing another for wrongfully keeping her dress. Neither party was represented by counsel. The plaintiff testified that the value of the dress was $30. The trial court dismissed the complaint on the ground that the plaintiff had not qualified as an expert, and was therefore incompetent to testify to the value of the dress. He advised the plaintiff to get a lawyer and bring a new action. The fact that the ruling was wrong (*Chamberlayne on Evidence*, Section 2140 et seq., and cases cited) does not affect the validity of this illustration. It represents an attitude which courts frequently exemplify in matters regarding which they are right, or at least in accord with precedent. An action for services in dyeing cotton goods was recently tried in which the defense was that the work had been improperly done. The defendant testified that the goods were in bad condition when he received them from the dyer. The court decided in favor of the plaintiff on the ground that the defendant failed to produce as a witness a third party to whom he delivered the goods for further processing after their receipt from the plaintiff. This decision was probably in accord with precedent (22 C. J., Tit. "Evidence" Sec. 56, pp. 115 et seq., and cases cited); but it failed to take account of the fact that the amount in controversy was only $100, so that the defendant would hardly have been justified in asking the third party to stay in court all day in order to testify.

A recent action for goods sold and delivered was tried at the New York Trial Term, and resulted in a verdict for the plaintiff. It was part of the plaintiff's case to prove the shipment of a certain quantity of goods by placing them on board a steamer in China. He produced a bill of lading from the steamship company admitting receipt of this quantity of goods. The Trial Term set aside the verdict and ordered a new trial on the ground that this was only hearsay evidence. (*London Produce Co.* v. *Poels & Brewster*, 124 Misc., 869) The rest of this decision is that the plaintiff had to either drop the case, take an appeal the outcome of which must be doubtful, or take a deposition in China. The amount involved was only $2,000. No one can doubt that in all probability the merchandise was shipped as agreed. It is fundamental in our law that a party must prove every element of his case by the personal presence in court of someone having personal knowledge of the facts. No doubt a higher degree of certainty can be assured in this way than by some other method of proof; but so far as I know, no serious consideration has ever been given to the question whether this greater certainty is worth the sometimes tremendous cost of gathering witnesses and keeping them in court for several days. Illustrations of this sort might be multiplied without limit. Those given suffice to illustrate the extent to which our courts apply logic without any thought of the resultant expense to the parties.

We have had much discussion pro and con on the subject of jury trials. This discussion has concerned itself principally with the question whether juries or Courts come nearer to doing justice to the litigants. They have also concerned themselves to some extent with the cost of jury trials by reason of their length, which has been estimated at from two to three times as great as that of trials of the same class of cases by a court alone. (See for example the interesting article of Presiding Judge Bond of the Maryland Court of Appeals on "Trying Criminal Cases by Judges Alone" American Bar Association Journal for November, 1925, at page 702.) So far as I am aware, they have not concerned themselves with the cost to the community of summoning jurors and paying for their services, nor with the cost to the jurors and their employers by reason of being taken away from their regular work, nor with the cost of dodging jury service on the part of those who are able to dodge it. In New York and Kings County in each year a total of

about 82,600 persons are summoned for jury service, of whom over 39,000 actually serve. They are paid a total of over $800,000 for their services. Thus the direct cost to the community of obtaining jurors (adding to the above the expense of summoning jurors and the general expenses of running the offices of the Commissioners of Jurors) is close to $1,000,000 a year in the Counties of New York and Kings alone. The indirect cost by reason of taking jurors from their other occupations must be added to this. The compensation to jurors, *including* cost of meals and hotel bills for jurors held over night, averages about $20.00 per juror. Certainly to the kind of man who makes good jury material this is not adequate compensation for the time lost in jury service. If any proof of this were needed, the general eagerness to dodge jury service would be sufficient. Nor is the distribution of this burden equitable. The theory is that jury service is a duty which everyone owes to the State, like military service in time of war. The fact is that this duty is performed by only a small portion of the population, and the entire burden of it is borne by them. The total number of males of jury age in New York and Kings County is approximately 1,100,000. Of these only 82,600 are *summoned* each year, and only 39,287 actually serve. As each juror is called on the average once every two years, this means that out of an eligible population of about 1,100,000 about 78,000, or 7%, bear the whole burden of jury service. Any discussion of the advantages of jury and non-jury service ought to take into account the direct cost to the community of summoning and paying jurors and the indirect cost to the jurors themselves, inequitably borne wholly by the small percentage of adult males who are unable to escape it. From this point of view, even a change to a jury of six would be a great gain to the community.

Our calendar system reminds us of Mark Twain's old gibe that everyone talks about the weather but no one does anything about it. It is true that the problem, especially in large centers of population, is one of great difficulty, probably not soluble in a completely satisfactory manner. But few of the discussions of this problem give adequate weight to the tremendous expense to parties, witnesses and counsel involved in the theory (more or less completely followed in practice) that counsel and witnesses are expected to remain in constant attendance at court from the moment a case is marked ready until it is reached for trial (often a matter of two weeks) ready to jump in and begin the trial at any time during that period at a moment's notice. Even so obvious an expedient as calling the calendar at 3 P. M. so that counsel could know at least a day in advance whether they are likely to be called for trial has, so far as I know, never been seriously tried.

The tendency at the present time is to give everyone "another chance" and a "day in court." No one is more in sympathy than I with the present disinclination to permit parties to be defeated on pure technicalities, and to allow amendments and adjournments when there is no prejudice to the other side; but it ought not to be forgotten that the expense of getting ready for trial twice or the expense of serving a party who is dodging service may be a very real prejudice, and that it cannot be adequately compensated by costs at our present rate, especially in view of the current prejudice against "practicing for costs."

One of the greatest services that the bench and the bar could render to the community would be to do everything possible to decrease the overhead of justice—and after all, any changes in our methods of legal procedure must come from the bench and the bar. The failure of the bench and the bar to do more than it has along these lines is undoubtedly due to the enormous inertia that has to be overcome to make any change, and the inbred conservatism and respect for precedent of the profession. If it were due to any feeling that the bar profits by the inefficiencies of procedure, it would more than justify all the criticisms that have been leveled at the legal profession. But such a feeling, if it existed anywhere, would be not only wicked, but mistaken. Here, as elsewhere, unselfishness is the most enlightened and far-sighted selfishness. Every business man knows that in the long run business will profit, not lose, by decreasing its overhead. Decreasing the cost of justice will in the long run enable lawyers to handle large matters on a more profitable basis than at present, and add to the field of profitable business multitudes of small matters which now must be handled unprofitably, if at all.

Next to its amount, the most important thing about the cost of justice is its distribution. I have already adverted to the injustice of placing part of the cost upon the judicial machinery itself—and this includes witnesses as well as jurors. There is another injustice in the distribution of the cost between the parties to the litigation. We are told that there is no wrong without a remedy. Yet a party who is compelled to seek redress in court for a wrong, or to defend an unjust claim, must pay a large percentage of the amount in controversy—20% is not at all unusual, and 50% not exceptional—in order to obtain that to which he is legally entitled. The law gives no compensation for this expense (except in the case of malicious prosecution) but so-called costs, which today are so small as to be ridiculous. The only defenses that I have ever heard of our present scale of costs are that the results of lawsuits do not always accord with justice, and that a larger scale might be deterrent to the prosecution of their claims by just litigants. But these are arguments for improving the quality of our justice, not for denying a party who has established the rightfulness of his position full compensation for the wrong he has suffered. If the law is to give a remedy for every wrong, it should give an adequate remedy for the wrong of compelling a man to hire a lawyer, collect evidence and go to court to establish the right. To allow really adequate costs to the prevailing party would not increase the cost of justice—it would allocate it, so far as possible, to the guilty instead of to the innocent party.

What can the bench and the bar do to decrease the cost of justice? The bar, in the actual conduct of litigation can do a little, but very little. There are some cases that are so obviously impossible to try under the legal rules of evidence that both counsel are willing to stipulate to waive those rules and permit facts which are really undisputed to be proved in a more economical way. In other cases, when actually on trial, counsel are willing to do the same thing rather than give the impression that they are trying to take an unfair advantage of tech-

nicalities. But in very many cases—probably a majority—one party or the other has an advantage to gain by insisting upon a strict observance of the rules. He has a legal right to do so. His counsel is his advocate, recognized as such by law, and not only has the right, but is under the duty to protect his client's interests by all the means sanctioned by law. It would be asking too much of human nature to expect counsel to give up what are after all the legal rights of his client in the interest of justice to the community in general, and to the adverse party in particular. The bench can do more. Where questions are still open, courts can decide them so as to save unnecessary burdens of cost to litigants. A good example of the right tendency is the recent decision of the Appellate Division of this Department that at least under certain circumstances notice to a corporation may be proved by showing that the witness called up the number under which the corporation was listed in the telephone and notified the person apparently in charge who answered, without further identifying that person (*Ratomeki v. Quittner*, 214 App. Div., 186, per McAvoy, J.). But today most questions are too well settled to allow much play for judicial liberalism in these matters. No court could refuse to apply the hearsay rule because it thought that in the particular case before it hearsay evidence was sufficiently trustworthy and direct evidence too expensive to be worth requiring. The courts can do a great deal, but they have not the power to attack the real fundamentals of this problem.

The only way this problem can really be solved is by organized law reform. We have many bodies today which are attempting to reform the law in a systematic way. They are doing much good work. They should not be afraid to deal with, and if need be, to change, fundamental principles of our procedural and substantive law. They are giving careful consideration to the question of what rules most nearly approximate justice. They should give more attention than they have given to the economic elements of the practical administration of justice, which after all, as I have tried to show, play at least as important a part in the social value of the judicial system as the theoretical justness of the rules themselves.

The purpose of this discussion has not been to advocate any particular reforms in the law but to suggest a viewpoint which has been almost completely overlooked both by courts and by law reformers, and which I believe to be capable, if properly disseminated, of bearing a rich harvest for the body of litigants, the public generally and the bar. If it contributes in any measure, however slight, to the accomplishment of this result, it will not have been written in vain.

Revised List of Approved Law Schools

Following is a revised list of the law schools approved by the Council of Legal Education and Admissions to the Bar. The classification formerly known as Class "B" has been discontinued as the Council felt there was no longer any need for its use. Members will find it a valuable aid in answering inquiries from prospective law students as to a suitable institution in which to pursue their studies:

Alabama, University of, School of Law, Tuscaloosa, Ala.
Arkansas, University of, Law Department, Fayetteville, Ark.
Boston University, The School of Law, Boston, Mass.
California, University of, School of Jurisprudence, Berkeley, Cal.
Catholic University of America, The School of Law, Washington, D. C.
Chicago, The University of, The Law School, Chicago, Ill.
Cincinnati, University of, School of Law, Cincinnati, Ohio.
Colorado, University of, School of Law, Boulder, Colo.
Columbia University, School of Law, New York, N. Y.
Cornell University, The College of Law, Ithaca, N. Y.
Creighton University, The College of Law, Omaha, Neb.
De Paul University, College of Law (Illinois College of Law), Chicago, Ill.
Drake University, The College of Law, Des Moines, Ia.
Emory University, The Lamar School of Law, Atlanta, Ga.
Florida, University of, College of Law, Gainesville, Fla.
Georgetown University, College of Law, Washington, D. C.
George Washington University, Law School, Washington, D. C.
Harvard University, The Law School, Cambridge, Mass.
Hastings College of Law (University of California), San Francisco, Cal.
Idaho, The University of, The College of Law, Moscow, Idaho.
Illinois, University of, College of Law, Urbana, Ill.
Indiana University, School of Law, Bloomington, Ind.
Iowa, The State University of, College of Law, Iowa City, Iowa.
Kansas, The University of, School of Law, Lawrence, Kans.
Kentucky, University of, College of Law, Lexington, Ky.
Louisiana State University, Law School, Baton Rouge, La.
Loyola University, School of Law, Chicago, Ill.
Marquette University, College of Law, Milwaukee, Wis.
Mercer University, The School of Law, Macon, Ga.
Michigan, University of, Law School, Ann Arbor, Mich.
Minnesota, University of, The Law School, Minneapolis, Minnesota.
Mississippi, University of, School of Law, Oxford, Miss.
Missouri, The University of, School of Law, Columbia, Mo.
Montana, University of, The Law School, Missoula, Mont.
Nebraska, The University of, College of Law, Lincoln, Neb.
Notre Dame, University of, College of Law, Notre Dame, Indiana.
North Carolina, University of, The School of Law, Chapel Hill, N. C.
North Dakota, The University of, The College of Law, Grand Forks, N. D.
Northwestern University, The Law School, Chicago, Ill.
Oklahoma, University of, The College of Law, Norman, Oklahoma.
Ohio State University, The College of Law, Columbus, Ohio.
Oregon, The University of, The School of Law, Eugene, Oregon.
Pennsylvania, University of, The Law School, Philadelphia, Pennsylvania.
Pittsburgh, University of, School of Law, Pittsburgh, Pa.
St. Louis University, Institute of Law, St. Louis, Mo.
South Carolina, University of, School of Law, Columbia, South Carolina.
South Dakota, University of, School of Law, Vermillion, South Dakota.
Southern California, University of, College of Law, Los Angeles, Cal.
Stanford University, The Law School, Palo Alto, Cal.
Syracuse University, College of Law, Syracuse, N. Y.
Tennessee, The University of, College of Law, Knoxville, Tennessee.
Texas, The University of, The School of Law, Austin, Tex.
Tulane University of Louisiana, College of Law, New Orleans, La.
Vanderbilt University, The School of Law, Nashville, Tenn.
Virginia, The University of, Department of Law, Charlottesville, Va.
Washburn College, The School of Law, Topeka, Kans.
Washington University, The School of Law, St. Louis, Mo.
Washington, University of, School of Law, Seattle, Wash.
Washington & Lee University, School of Law, Lexington, Virginia.
Western Reserve University, The Franklin Thomas Backus Law School, Cleveland, Ohio.
West Virginia University, The College of Law, Morgantown, W. Va.
Wisconsin, The University of, Law School, Madison, Wis.
Wyoming, University of, The Law School, Laramie, Wyo.
Yale University, School of Law, New Haven, Conn.

REVIEW OF RECENT SUPREME COURT DECISIONS

Covenant Running With Land Against Sale to Negroes Not Void Under Constitutional Amendments—Chinese Bookkeeping Act in Philippines Violates Due Process—Right of State to Classify Ore Lands for Taxation—Due Process and State Regulation of Private Carriers—Commerce Commission May Authorize Abandonment of Intrastate Lines in Certain Cases—Incapacity of Minority Stockholder to Maintain Bill to Enjoin Railroad from Controlling Potential Competitors—Non-Resident Agents

By Edgar Bronson Tolman

Contracts,—Discrimination on Account of Color

A covenant, running with the land, providing that the land affected shall never be sold or leased to negroes, is not rendered void by the Fifth, Thirteenth, or Fourteenth Amendment, or by Federal statutes enacted in aid of these Amendments; these contentions, therefore, raise no constitutional question giving the Supreme Court jurisdiction of an appeal.

Corrigan et al v. Buckley, Adv. Ops. 560, Sup. Ct. Rep. v. 46, p. 521.

The owners of certain contiguous parcels of land situated in the City of Washington executed an indenture, duly recorded, by which they mutually covenanted, by a covenant stated to run with the land, that none of the parcels should ever be sold or leased to persons of the negro race, or ever be occupied by negroes. Corrigan and Buckley were parties to this agreement. In 1922 Corrigan entered into a contract for the sale of one of the parcels of land subjected to the covenant to Curtis, whom Corrigan knew to be a person of negro race. Buckley thereupon brought suit in equity to restrain the consummation of this contract of sale. Both defendants moved to dismiss the bill, Corrigan upon the grounds that the covenant was "void as in violation of the Constitution of the United States," and "void in that the same is contrary to public policy," and Curtis upon the ground that the covenant was forbidden by the Fifth, Thirteenth and Fourteenth Amendments. The Supreme Court of the District of Columbia denied the motions. Defendants elected to stand upon them, and a final decree granting the injunction was entered. The Court of Appeals affirmed this decree. Defendants then invoked the appellate jurisdiction of the Supreme Court of the United States, according to the procedure specified by Section 250 of the Judicial Code before its recent amendment. The Supreme Court dismissed the appeal for want of jurisdiction.

Mr. Justice Sanford delivered the opinion of the Court. He concluded that there was here no substantial question involving the Constitution or Federal statutes as to give the court jurisdiction to entertain the appeal. He said:

> Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is "void" in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. This contention is entirely lacking in substance or color of merit. The Fifth Amendment "is a limitation only upon the powers of the General Government" (Citing case), and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. (Citing case.) And the prohibitions of the Fourteenth Amendment "have reference to State action exclusively, and not to any action of private individuals." (Citing case.) "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." (Citing cases.) It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being "against public policy," does not involve a constitutional question within the meaning of the Code provision.
>
> The claim that the defendants drew in question the "construction" of sections 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments. Assuming that this contention drew in question the "construction" of these statutes, as distinguished from their "application," it is obvious, upon their face, that while they provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect.
>
> We therefore conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal.

The Court was therefore precluded from considering on the merits the further contentions of defendants that the covenant was unenforceable in equity because contrary to public policy and because discriminatory in character.

The case was argued by Messrs. Louis Marshall and Moorfield Story for appellants and by Mr. James S. Easby-Smith for appellee.

Statutes,—Chinese Bookkeeping Act of the Philippines

The Chinese Bookkeeping Act, enacted by the Philippine Legislature, making it a crime to keep accounts in any language other than English, Spanish or local dialects,

cannot be construed to mean anything other than the plain purport of these words. So construed, the Act is invalid because it deprives Chinese merchants of their liberty and property without due process of law.

Yu Cong Eng. et al. v. Trinidad et al., Adv. Ops. 701, Sup. Ct. Rep. v. 46, p. 619.

As in many other parts of the world where the white man has gone to exert political control over less civilized peoples, the Chinese in the Philippines have assumed the role of merchants and shopkeepers. The record in the present case showed that the Chinese did about sixty per cent of all the business done on the islands. The public revenues of the islands are derived in large part from a sales tax and an income tax. A source of great difficulty in the apportionment and collection of these taxes has resided in the fact that the Chinese merchants have kept their books in Chinese, which none of the tax officials could read. It was thus possible for the Chinese to evade their taxes. In 1921 the Philippine Legislature passed the statute here held unconstitutional. It provided, under penalty of a fine of not more than ten thousand pesos or imprisonment for not more than two years, or both, that no person or company engaged in business in the Philippine Islands should keep its account books in any language other than English, Spanish or any local dialect. For violation of the Act, the authorities proceeded against Yu Cong Eng. This Chinese merchant and another, on behalf of all others so situated, brought this suit to prevent the enforcement of the Act. Their petition set out that almost none of the Chinese could read or write any language other than Chinese, that few of their businesses were large enough to justify the employment of a bookkeeper, that anyway they would be at the mercy of a bookkeeper using a language they could not read, and that finally the enforcement of the Act would drive many of the Chinese out of business. The Philippine authorities, on their part, set out the losses to the public treasury due to evasion and fraud made possible by bookkeeping in Chinese.

A majority of the Philippine Supreme Court, adverting to their duty, if possible, to construe the statute so as to render it constitutional, arrived at a construction which permitted them to sustain the Act. They held that the statute merely required the keeping of such books as were necessary in order to facilitate governmental inspection for tax purposes. The Supreme Court of the United States, to which the petitioners brought the case by writ of error, held that to construe the Act in this manner was in reality to write a new law; that the Act meant just what it said; and that it was unconstitutional.

The CHIEF JUSTICE delivered the opinion of the Court. After an interesting resumé of the polyglot situation which had given rise to the governmental problem, and of the arguments offered on both sides, he said:

> The Court in effect concludes that what the Legislature meant to do was to require the keeping of such account books in English, Spanish or the Filipino dialects as would be reasonably adapted to the needs of the taxing officers in preventing and detecting evasion of taxes, and that this might be determined from the statutes and regulations then in force. What the court really does is to change the law from one which by its plain terms forbids the Chinese merchants to keep their account books in any language except English, Spanish or the Filipino dialects, and thus forbids them to keep account books in the Chinese, into a law requiring them to keep certain undefined books in the permitted languages. This is to change a penal prohibitive law to a mandatory law of great indefiniteness to conform to what the Court assumes was, or ought to have been, the purpose of the Legislature, and which in the change would avoid a conflict with constitutional restriction.
>
> It would seem to us from the history of the legislation and the efforts for its repeal or amendment, that the Philippine Legislature knew the meaning of the words it used, and intended that the Act as passed should be prohibitory and should forbid the Chinese merchants from keeping the account books of their business in Chinese. Had the Legislature intended only what the Supreme Court has construed it to mean, why should it not have amended it accordingly? Apparently the Legislature thought the danger to the revenue was in the secrecy of the Chinese books, and additional books in the permitted languages would not solve the difficulty.
>
> We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.
>
> One of the strongest reasons for not making this law a nose of wax to be changed from that which the plain language imports, is the fact that it is a highly penal statute authorizing sentence of one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, we are creating by construction a vague requirement, and one objectionable in a criminal statute.

After a review of cases, he continued:

> The effect of the authorities we have quoted is clear to the point that we may not in a criminal statute reduce its generally inclusive terms so as to limit its application to only that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity. What it is proposed to do here is much more radical, for it is to ignore and hold for naught a plain prohibition of the keeping of account books in Chinese and insert in the act an affirmative requirement that account books not definitely determined which are adapted to the needs of the taxing officials be kept in the permitted languages. This is quite beyond the judicial power.

He rejected the contention that the Court should accept the construction placed on the Act by the Philippine Court as it would the construction of a state court in passing upon the federal constitutionality of a state statute:

> The Philippines are within the exclusive jurisdiction of the United States Government, with complete power of legislation in Congress over them, and when the interpretation of a Philippine statute comes before us for review, we may if there be need therefor re-examine it for ourselves as the court of last resort on such a question. It is very true that with respect to questions turning on questions of local law, or those properly affected by custom inherited from the centuries of Spanish control, we defer much to the judgment of the Philippine or Porto Rican courts. (Citing cases.) But on questions of statutory construction as of the Philippine Code of Procedure adopted by the United States Philippine Commission, this Court may exercise an independent judgment.

Therefore, he concluded:

> We can not give any other meaning to the Bookkeeping Act than that which its plain language imports, making it a crime for any one in the Philippine Islands engaged in business to keep his account books in Chinese. This brings us to the question whether the law thus construed to mean what it says is invalid.

And it was not difficult to decide that so construed the Act was unconstitutional. He said:

> Of course the Philippine Government may make every reasonable requirement of its taxpayers to keep proper records of their business transactions in English or Spanish or Filipino dialect by which an adequate measure of what is due from them in meeting the cost of government can be had. How detailed those records should be we need

not now discuss, for it is not before us. But we are clearly of opinion that it is not within the police power of the Philippine Legislature, because it would be oppressive and arbitrary, to prohibit all Chinese merchants from maintaining a set of books in the Chinese language, and in the Chinese characters, and thus prevent them from keeping advised of the status of their business and directing its conduct. As the petitioner, Yu Cong Eng, well said in his examination, the Chinese books of those merchants who know only Chinese and do not know English and Spanish (and they constitute a very large majority of all of them in the Islands) are their eyes in respect of their business. Without them such merchants would be a prey to all kinds of fraud and without possibility of adopting any safe policy. It would greatly and disastrously curtail their liberty of action, and be oppressive and damaging in the preservation of their property.

We agree with the Philippine Supreme Court in thinking that the statute construed as we think it must be construed is invalid.

Taxation,—Royalties from Mines

A State may treat ore lands as a distinct class of property and impose upon them a tax not extended to other sorts of land without depriving the owners of the equal protection of the laws.

Lake Superior Consolidated Iron Mines et al. v. Lord et al., Adv. Ops. 691, Sup. Ct. Rep. v. 46, p. 627.

In 1921 the Minnesota Legislature passed a law taxing those engaged in mining six per cent of the net value of the ore extracted. In 1923 the Legislature passed the Act here in question, a law which applied to leased ore lands, taxing the royalty received by the owner or the sublessor six per cent. Certain owners and sublessors brought this suit to restrain the enforcement of the Act. They contended that this tax was not laid uniformly upon the same class of subjects, and so offended the equal protection, due process and obligation of contracts clauses of the Federal Constitution, and the uniformity of taxation provision in the State Constitution. The District Court for Minnesota dismissed the bill. Upon appeal the Supreme Court affirmed the decree.

Mr. Justice McReynolds delivered the opinion of the Court. He concluded that if the tax were within the taxing power of the State it could not impair the appellants' contracts; and that the equality of taxation provision of the Minnesota Constitution went no farther than the Fourteenth Amendment. Consequently it was necessary to consider the validity of the Act only in the light of that Amendment. The Minnesota courts had construed the tax as a tax upon land. Hence the owner's residence and the place fixed for payment of the royalties were immaterial. He then said:

> The remaining question is whether the Legislature may treat ore lands as a distinct class of property and impose upon them a tax not extended to quarries, forests, etc., without depriving their owners of the equal protection of the laws guaranteed by the Fourteenth Amendment. And this question must be answered in the affirmative, under the principles announced in Heisler v. Thomas Colliery Co., 260 U. S. 245, where we sustained a tax confined to anthracite coal against the objection of arbitrary classification in that bituminous coal was not included. The State Legislature may exercise wide discretion in selecting the subjects of taxation (Citing case) so long as it refrains from clear and hostile discrimination against particular persons or classes. (Citing case.) Certainly, ores differ as much from other products of the land as anthracite coal does from the bituminous variety, and ore gives character to appellants' holdings. Lands chiefly valuable for ore are depreciated by its extraction, and probably will yield less and less under an *ad valorem* tax as the mining continues. The situation is very different where the principal value depends on other uses which do not deplete. The selection of the business of mining only, for imposition of the occupation tax, was not arbitrary and, certainly, we cannot say that the classification by the legislation now assailed was without any reasonable basis.

Mortgages, Foreclosure of, Notice

A statute giving the holder of a debt secured by a security deed the right to bring the property to sale in satisfaction of the debt, does not, in not requiring notice to one who purchased the land subject to the security deed, deny such purchaser due process of law.

Scott v. Paisley et al., Adv. Ops. 673, Sup. Ct. Rep. v. 46, p. 591.

A Georgia statute provides that where the legal title to land has been conveyed as security for a debt, the holder of the debt may, after reducing his debt to judgment, satisfy it out of the land by having the holder of the legal title make and record a quit-claim conveyance to the debtor reinvesting him with legal title, and by then levying upon the land and causing it to be sold. In the present case Dorothy Scott had purchased land subject to such a security deed. The holder of the debt, also the holder of the legal title, reduced his debt to a judgment, executed and recorded a quit-claim deed, and had the land sold at public sale. All this was done without notice to Dorothy Scott, the purchaser from the grantee, and she contended that in divesting her of the interest which she had acquired without opportunity to be heard, the statute denied her rights guaranteed by the Fourteenth Amendment. The trial court, however, dismissed her petition, and this judgment was affirmed by the Supreme Court of Georgia and again by the Supreme Court of the United States.

Mr. Justice Sanford delivered the opinion of the Court. He said:

> Here the holder of the secured debt was also the holder of the legal title to the property by which it was secured. In such case at least, Section 6037 authorizes the holder of the secured debt, by following the procedure outlined by the statute, to bring the property to sale in satisfaction of the debt. Its effect is no more than if it conferred upon the holder of the secured debt a statutory power of sale, which may be treated as equivalent, in so far as the constitutional question is concerned, to an express power of sale in a mortgage or trust deed.
>
> Plainly the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale. The validity of such a contractual power of sale is unquestionable. . . .
>
> So, a purchaser of land on which there is a prior security deed acquires his interest in the property subject to the right of the holder of the secured debt to exercise the statutory power of sale. There is no established principle of law which entitles such a purchaser to notice of the exercise of this power. And Section 6037 neither deprives him of property without due process of law nor denies him the equal protection of the laws.

Carriers,—State Regulation of Private Trucking Companies

It is a denial of due process of law for a State to require of private carriers, as a condition precedent to their continued enjoyment of the privilege of using the public highways, that they subject themselves to all the duties and burdens of common carriers.

Frost & Frost Trucking Co. v. Railroad Commission of California, Adv. Ops. 682, Sup. Ct. Rep. v. 605.

The recent rapid development of transportation

by truck and motor omnibus has given rise to important practical problems which in turn have evoked new legal questions as to the validity of state regulation of such carriers. Thus in *Buck v. Kuykendall*, 267 U. S. 307 (reviewed in the May, 1925 number of the JOURNAL) it was held that it was a violation of the Commerce Clause for a State to require of a common carrier of passengers by automobile purely in interstate commerce, that it first secure from the state authorities a certificate of public convenience and necessity. In the present case the statute (the Auto. State and Truck Transportation Act of California, 1917, p. 330) required, as a prerequisite to the use of the public highways, that carriers of goods obtain such a certificate. But possible conflict with the commerce clause was not involved. Here the carriers complaining of the statute were private carriers, who were engaged under a single private contract in transporting citrus fruit between fixed termini. The act, however, which had originally given broad powers of regulation of common carriers operating over the highways to the Railroad Commission, including the regulation of fares, charges, and classifications, was in 1919 amended so as to bring under the control of the commission automotive carriers of persons or property operating under private contracts. The commission directed the Trucking Company to suspend its operations until it should secure the certificate of public convenience and necessity. The order was upheld by the state supreme court. Invoking the Fourteenth Amendment, the company brought the case by writ of error to the Supreme Court of the United States, and there the judgment was reversed.

Mr. Justice Sutherland delivered the opinion of the Court. The state courts had construed the statute as in effect offering a special privilege of using the public highways for compensation to private carriers on condition that they would dedicate their property to the quasi-public use of public transportation. Accepting this construction, the learned Justice proceeded:

> It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions. Protection or conservation of the highways is not involved.

The regulation, he pointed out, of plaintiff in error was not regulation of it as a private carrier, but by virtue of the status of common carrier imposed upon it by the Act. It was clear, he continued, that a state could not by mere fiat transform a private carrier into a public carrier. Nor could it, he concluded, accomplish the same thing by requiring this unconstitutional result as a condition precedent to the enjoyment of a privilege which the State might perhaps withhold. He said:

> There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

He reviewed the series of cases in which limitations had been made in the general power of a State to exclude foreign corporations, holding that a State can not impose conditions repugnant to the Constitution upon foreign corporations desiring to do business in the State. After adducing this support for the position already logically reached, he said, in conclusion:

> We hold that the act under review, as applied by the court below, violates the rights of plaintiffs in error as guaranteed by the due process clause of the Fourteenth Amendment; and that the privilege of using the public highways of California in the performance of their contract is not and cannot be affected by the unconstitutional condition imposed. (Citing case.)
>
> The court below seemed to think that, if the state may not subject the plaintiffs in error to the provisions of the act in respect of common carriers, it will be within the power of any carrier, by the simple device of making private contracts to an unlimited number, to secure all the privileges afforded common carriers without assuming any of their duties or obligations. It is enough to say that no such case is presented here; and we are not to be understood as challenging the power of the state, or of the railroad commission under the present statute, whenever it shall appear that a carrier, posing as a private carrier, is in substance and reality a common carrier, to so declare and regulate his or its operations accordingly.

Mr. Justice Holmes was once more unable to conclude that the Court should hold that the Fourteenth Amendment inhibited the State from acting against plaintiff in error in the manner complained of. In his dissenting opinion, Mr. Justice Brandeis concurring, he declared that the only question before the Court was whether the order of the Commission requiring the carrier to desist from operating over the highways until it had secured the certificate, was invalid. The section invoked was separable from the other sections of the Act regulating rates and otherwise subjecting private carriers to the burdens of public carriers. He said in part:

> The point before us seems to me well within the legislative power. We all know what serious problems the automobile has introduced. The difficulties of keeping the streets reasonably clear for travel and for traffic are very great. If a State speaking through its legislature should think that, in order to make its highways most useful, the business traffic upon them must be controlled, I suppose that no one would doubt that it constitutionally could, as, I presume, most States or cities do, exercise some such control. The only question is how far it can go. I see nothing to prevent its going to the point of requiring a license and bringing the whole business under the control of a railroad commission so far as to determine the number, character, and conduct of transportation companies and so to prevent the streets from being made useless and dangerous by the number and lawlessness of those who seek to use them. I see nothing in this act that would require private carriers to become common carriers but if there were such a requirement, it, like the provisions concerning rates and accounts, would not be before us now, since, as I have said, the statute makes every section independent and declares that if valid it shall stand even if all the others fall.

Mr. Justice McReynolds separately expressed his dissent upon the following grounds:

> The questions involved relate solely to matters of intrastate commerce. No complication arises by reason of the power of Congress to regulate interstate commerce. Having built and paid for the roads, California certainly has the general power of control. Plaintiffs in error are without constitutional right to appropriate highways to

their own private business as carriers for hire. And if, in so many words, the Legislature had said that no intrastate carriers for hire except public ones shall be permitted to operate over the state roads it would have violated no federal law. So far as the rights of plaintiffs in error are affected, nothing more serious than that has been done.

The States are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution.

I think the decree of the court below should be affirmed.

Carriers,—Interstate and Intrastate Commerce

The power of the Federal Government to regulate interstate commerce is paramount, and the Interstate Commerce Commission may authorize the abandonment of intrastate lines, used also for interstate commerce, where continued use would lay a burden on interstate commerce.

Colorado v. United States, Adv. Ops. 520, Sup. Ct. Rep. v. 46, p. 452.

The Colorado & Southern Railway is operated in both interstate and intrastate commerce. Before the inception of the proceedings which gave rise to the present litigation, it operated, a short narrow gauge line which was not directly connected with the main lines of the Colorado & Southern, but was operated through other carriers which connected with this short line. The line was entirely within the state of Colorado. Part of the traffic carried thereon moved in interstate commerce and part in intrastate commerce. For some years there had been little demand for the services of the line, and its operation had resulted in a large annual deficit. The Interstate Commerce Commission inquired into the circumstances and issued a certificate of public convenience and necessity authorizing the abandonment of the line. While this order still stood, but was under attack before the Commission, the State of Colorado brought this suit in the District Court for the District of Colorado to enjoin and set aside the order of the Commission so far as it authorized the discontinuance of intrastate traffic. The contention was that the Commission was without power to authorize the railroad to abandon, as respects intrastate traffic, a part of its line lying wholly within the State. The State argued that the Federal Government had no power to release a carrier from its primary obligation to furnish intrastate service on its lines merely because the operation of the branch necessarily resulted in financial loss. But the Supreme Court, to which came by appeal the decree dismissing the bill, rejected this contention and affirmed the decree.

Mr. Justice Brandeis delivered the opinion of the Court. He said:

> The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. . . .
>
> The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which is found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service. . . .

He recalled that series of decisions in which the Court had sustained other provisions of the Transportation Act recognizing the effect upon interstate commerce of the same instrumentality used in intrastate commerce. Among such provisions were: that conferring exclusive jurisdiction upon the Commissioner over the issuance of securities; the recapture clause, as applied to surplus profits derived from intrastate operations; and that provision requiring carriers engaged in both interstate and intrastate commerce to render accounts. He then said:

> The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. (Citing case.) But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. (Citing case.) Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered.

He likewise rejected the contention that the order issuing the certificate of necessity and convenience was void because the Commission had failed to make certain findings—that, for example, the continued operation of the branch caused a discrimination against interstate commerce, or that such operation would prevent the company from earning a fair return on its properties. The learned Justice said in part:

> It is rare that the application for leave to abandon actually involves a conflict between the needs of interstate and of intrastate commerce. In many cases, it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests—the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the

Act does not make issuance of the certificate dependent upon a specific finding to that effect.

The case was argued by Mr. Barney L. Whately for appellant, Assistant to the Solicitor General Blackburn Esterline for the United States, by Mr. R. Granville Curry for the Interstate Commerce Commission and by Mr. Bruce Scott for the Colorado and Southern Railway Co.

Carriers,—Stock Ownership, Domination, and Control

A minority stockholder is without the capacity to maintain a bill to enjoin, as in restraint of interstate commerce, a railroad from controlling potential competitors through stock ownership. This lack of requisite standing is a question going to the merits; therefore the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.

General Investment Co. v. New York Central Railroad Co., Adv. Ops. 604, Sup. Ct. Rep. v. 46, p. 496.

Plaintiff, a minority stockholder in the New York Central Railroad Company, attacked, as in violation of the Sherman and Clayton Acts, that consolidation agreement whereby the New York Central had come to control the Michigan Central, the Big Four, and other potentially competing carriers. This control, it was alleged, was effected by ownership of stock in these companies operating parallel lines. Plaintiff invoked Federal jurisdiction by alleging diversity of citizenship, and showed that the necessary value was involved. The suit was brought in the District Court for the Northern District of Ohio. That court, upon defendants' motion, dismissed the bill. A week thereafter it granted a certificate stating that the dismissal was for want of jurisdiction, and allowed a direct appeal to the Supreme Court under Section 238, Judicial Code. The Supreme Court held that the District Court had had jurisdiction of the subject matter, and that the dismissal had really been on the merits. As the decree of dismissal was, as stated in the certificate, put on an untenable ground, the Court reversed the decree.

Mr. Justice Van Devanter delivered the opinion of the Court. The present suit, he said, was of a sort of which the federal courts were given jurisdiction. He continued:

> By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits (Citing cases), as where the plaintiff seeks preventive relief against a threatened violation of law of which he has no right to complain, either because it will not injure him or because the right to invoke such relief is lodged exclusively in an agency charged with the duty of representing the public in the matter. Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction. (Citing cases.) If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction.

An examination of the memorandum prepared by the lower court in its consideration of the motion to dismiss showed that it had concluded that

> the plaintiff, as a private litigant, was without capacity or right to maintain the bill in respect of the alleged restraint of interstate commerce, because the right to maintain such a bill against railroad carriers was lodged exclusively in others who are charged with guarding the public interest, and, secondly, that the interstate and intrastate business of the carriers affected are so inextricably interwoven that it would be impossible to award any relief reaching their intrastate business without equally affecting their interstate business, and therefore to permit the plaintiff to maintain the bill in respect of the alleged violation of state laws would be indirectly permitting a private litigant to do what in effect is prohibited by federal law.

The learned Justice said, in conclusion:

> As the decree was entered a week or two later and the court expressly certified that the dismissal was for want of jurisdiction of the subject matter, we have given effect to the certificate and have examined the question certified. Our conclusion is that the court had jurisdiction of the subject matter and therefore that the decree of dismissal was put on an untenable ground.

Argued by Mr. Frederick A. Henry for appellant and by Mr. S. H. West for appellee.

Insurance,—Non-Resident Agents

A statute excluding from the right to do business within the State insurance companies paying fees to non-residents for obtaining policies covering risks within the state violates the Fourteenth Amendment and is void.

Fidelity and Deposit Company of Maryland v. Tafoya et al., Adv. Ops. 379, Sup. Ct. Rep. v. 46, p. 331.

A New Mexican statute made it unlawful for any insurance company operating in the State to do business except through duly appointed resident agents; it authorized the exclusion of any company which should pay any emolument to a nonresident for writing policies covering risks in New Mexico. For violation of this provision the State Corporation Commission took steps to exclude the Fidelity Company. The Company brought suit to prevent the Commission from thus enforcing the statute against it. The District Court for the District of New Mexico dismissed the bill. The Supreme Court, upon appeal, proceeded to consider the case upon its merits, concluded that the statute was unconstitutional, and reversed the decree.

Mr. Justice Holmes delivered the opinion of the Court. He adduced cases in which the Court had held unconstitutional attempts by a State to exercise its right to exclude corporations as a part of a scheme to accomplish a forbidden result. Referring to one of these cases, in which the state had attempted to justify its regulation of the conduct of foreign railroad corporations in other States by virtue of the fact that the companies had tracks and did business within the State, he said:

> The case last cited was one of an attempt to regulate the corporation's payments in another State. By the same principle on even stronger grounds the corporation cannot be prevented from employing and paying those whom it needs for its business outside the State. The difficulty was fully appreciated by the counsel for the appellee and he therefore sought to limit the generality of the words, at least in the case of agents, and to make out that the object was to prevent the use of dummy agents in the State. It was suggested that agents were paid by commissions at well known conventional rates and that the statute meant to forbid the dividing of these commissions, and in that way to prevent the work being done and paid for elsewhere, while nominal agents in New Mexico were paid small sums for the use of their names. In short it is said the purpose was to secure responsible men to represent the Company on the spot. But whether such an interpretation would save the act or not it is impossible to limit it in that way. It forbids the payment of any emolument of any nature to any person for the obtaining, placing or writing of any policy covering risks in New Mexico. The words go beyond any legitimate interest

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ALTON BROOKS PARKER

By Hon. Morgan J. O'Brien*

ALTON BROOKS PARKER, who was one of the founders, directors, and for two terms the President of this Association, died May 10th, 1926.

He made many and valuable contributions to the science of jurisprudence, to the profession of the law, to exalted judicial work, to this Association and to his State and Country.

The questions which confront us in attempting to summarize the life and deeds of any man are difficult because the answers depend on our estimate of the use of the talents which the Lord gave him.

As a scholar, lawyer, judge and statesman, Alton B. Parker made a deep impression on his day and generation in various fields of human endeavor. These enlisted strong qualities of mind and body, inducing him to labor for things that were useful, exalted and right.

Were we to indulge in invidious distinctions we might perhaps select from the great lawyers of the past some man or some men, who because of transcendent abilities or unusual brilliancy of mind, or great capacity for professional work, might be thought by some to excel in life's work and achievement what was accomplished in a simple, direct and unostentatious way by Judge Parker. Professional success which inures solely to the advantage of the possessor is not the sole test to be applied in determining the position or standing of a lawyer. With exceptional talents one may devote them to the acquisition of wealth or to a struggle for name and fame, or to secure for himself the means of moving along the primose path of pleasure. But the real test of the character and standing of a lawyer is to be judged not by what he has secured for himself, but the extent to which he has employed his ability and talents, not alone in his profession and to his own aggrandizement, but also to what extent they have been employed in elevating the ideals and standards of law and justice which are among the great concerns of men on earth.

If we look back at the legal giants who have adorned the past history of our profession we are others.

It would exceed our limits and purpose were we to recall the names and deeds of these great lawyers of the past, who still live in memory, and contrast their careers with other brilliant lawyers who unmindful of forcibly struck by the fact that the people and the profession recognize the part, if any, taken in promoting objects outside the profession which are worth while and which call for service resulting in benefit to service were concerned only with their own success. Their names and deeds are soon forgotten and like meteors they flash for a moment and thereafter are gone forever.

ALTON BROOKS PARKER
1852-1926

Alton Brooks Parker was born at Cortland, New York, on May 14, 1852. His ancestors on both sides can be traced back to the Colonial period and the records show that they bore creditable parts in the birth of the nation.

He was educated at the State Normal School at Cortland and afterwards at the Albany Law School, from which he graduated in 1872.

His decision to study law was made quite by accident. He attended Court one day to hear a case in which his father was a juror. An eloquent lawyer, in summing up for the defense, made a plea that impressed the eager listener and he determined upon a legal career.

Upon his admission to the bar he began his practice at Kingston, New York, and in 1877 was elected Surrogate of Ulster County, and re-elected in 1883.

At that time Augustus S. Schoonmaker, a prominent lawyer, was elected County Judge, and in supporting him for election Judge—then Mr.—Parker became intimate with the family of Judge Schoonmaker and from that household selected his bride, Miss Mary Louise Schoonmaker. There were two children by the marriage, a son, John, who died in his seventh year, and a daughter, Bertha, who became, and still is, the wife of the Rev. Charles Mercer Hall of Kingston, an Episcopal clergyman.

The first Democratic National Convention to which Judge Parker was elected as a delegate was the one in which Grover Cleveland received his first nomination for the Presidency. Upon the latter's election Judge Parker was offered the post of First Assistant Postmaster General, which he declined.

In 1885 David B. Hill, then Democratic candidate for Governor, selected him to manage his campaign and had him made Chairman of the Democratic State Committee, and it was in this campaign that he became known as a representative Democrat of the State be-

*This Memorial of Judge Parker was written by Judge O'Brien for the New York County Lawyer's Association.

cause he was successful in bringing about the election of the entire Democratic state ticket.

Soon after the election of Governor Hill, Judge Westbrook, who was then the Supreme Court Judge in the Third Judicial District, died. Governor Hill immediately appointed Parker to the vacancy. He was then but thirty-four years old. He was, within the year, nominated by the Democrats for a full term as Justice of the Supreme Court to succeed himself, and in the short period that he had served as Judge he had so impressed the voters of his district by his record that the Republican Party did not enter a candidate to oppose him.

We love to think of Alton B. Parker as an able and just Judge. In the discharge of his duties and while noted for many able opinions, the one trait born of his kindly nature which stands out is the consideration which, as a judge, he extended to the young men who appeared before him in the trial court and in presenting their arguments to the Court of Appeals. Particularly where it was known to him that the young lawyer was making his first appearance he would at once place him at ease and relieve him of his tremor and trepidation by the genial manner in which he spoke to him and would lend him every encouragement in the presentation of his case.

The Republican majority in the State election of 1896 had been 212,000 but in 1897 Judge Parker, who had been nominated by his party for Chief Judge of the Court of Appeals, was elected by a plurality of 60,000 votes. He served in office as Chief Judge until 1904, when he was nominated by the Democratic National Convention for the Presidency.

The candidate of a party then torn by opposing radical and conservative elements, was nominated on a compromise platform which made no mention of the all-absorbing currency problem of that period.

Having been informed of his nomination and of the various planks of the platform and just as the delegates were preparing to adjourn, he wired to Mr. William F. Sheehan from his Esopus home, as follows:

> I regard the gold standard as firmly and irrevocably established, and shall act accordingly if the action of the convention today be ratified by the people. As the platform is silent on the subject my view should be made known to the convention, and if it is proved to be unsatisfactory to the majority I request you to decline the nomination for me at once so that another may be nominated before adjournment.

The sending of such a telegram at such a time may not have been good politics but it was an indication of the character and courage of the man. The platform makers might be silent on money, but in what he believed the interests of the country he refused to remain silent.

Champ Clark wrote in his memoirs that until this telegram was sent the Judge's chances were by no means hopeless but the telegram, a blow in the face of the Bryanites, hurt Parker immeasurably in the West; to an extent that even Missouri was carried by Theodore Roosevelt.

Many Democrats considered his telegram a great tactical mistake but he regarded it as an act of common honesty. Whatever the consequences, they never disturbed his serenity, and after, as before his defeat, he was the most serene of men. He was far more interested in his Country and in life than he was in politics and he lived with a zest for all the finer things.

After the law firm of Parker, Hatch & Sheehan of New York City was formed, Judge Parker was a delegate at large to the Democratic Convention in 1912 and served as chief counsel for the impeachment of Gov. Sulzer in 1913. Judge Parker later organized the law firm of Parker, Marshall, Auchincloss & McClosson.

In professional, civic and patriotic lines he devoted a great deal of his time up to his death. He served as President of the American Bar Association in 1906 and 1907; President of the New York State Bar Association 1913 and 1914, and was made President of the National Civic Federation in 1919, which position he held at the time of his death. He was a member of the American Academy of Jurisprudence. He belonged to the Metropolitan, Century, Manhattan, Automobile Club of America, Riding, Church and National Democratic Club.

This summary statement gives but a faint outline of the scope of his life's work.

The greatest event, naturally, was his nomination by the Democratic Convention for President of the United States. The attitude which he assumed upon receiving notice of his nomination for the Presidency enlisted encomiums from friend and foe.

Theodore Roosevelt, who was his successful competitor for the Presidency, among other things, thus characterized his gold telegram:

> It was a bold and skillful move . . . he now stands forth to the average man . . . as one having convictions compared to which he treats self-interest as of no account.

A sterling Democrat who was the candidate of the party for the Presidency in 1924, John W. Davis, thus speaks of him:

> He was one of the outstanding figures in public life in the United States, a man of great courage, loyalty and devotion to his convictions. As a jurist he combined all the highest ideals of the bench and bar.

This attempt to summarize a useful and successful career which was due largely to his manifold pursuits and devoted to the promotion of what was good, useful and true, would be woefully lacking if I did not dwell for a moment on his personal character and traits.

To the members of this Association he bore a near and close personal relationship which takes into account his fine social qualities and his strong and splendid nature, as evidenced by his charm and by the loyalty extended to those who came within his circle as a friend. Kind in nature, charitable in thought and expression, a warm heart full of generous emotions. These were all expressed in his touch with friends and associates and appeared in his kindly and gentle smile.

He was a man of impressive stature and handsome appearance, with a suggestion of power, courage and good nature.

In character he was upright and true; to friends and associates he was sociable, sincere, unselfish and loyal.

He was natural, honest and ambitious but he lacked conceit and pretence.

He neither claimed or assumed to be over brilliant or scintillating or dramatic.

He was a strong, courageous and virile man but he recognized his limitations. Never have we known any one who made better or higher uses of the equipment and gifts which he received from the Lord and which he wisely and prudently employed in life's work.

> "Rich in saving common sense
> And as the greatest only are
> In his simplicity sublime."

To those who knew him well it matters little whether he was successful or not as a candidate for

President, for we cherish the gifts of mind and heart which he possessed and shared with us and which will ever keep his memory green and sacred.

This tribute would not be complete without recalling his deep and sincere religious faith. He loved life as it was given to him by the Creator, and he loved the sunlight, the stars, the trees, the flowers. These were among the delights of his heart and their study occupied many of his leisure hours. In dying, Judge Parker might well have exclaimed with Paul: "I have fought a good fight, I have finished my course, I have kept the faith. As to the rest there is laid up for me a crown of justice, which the Lord the Just Judge will render to me in that day."

STATE ADMINISTRATIVE REORGANIZATION IN NEW YORK

By Walter F. Dodd
Of the Chicago, Ill., Bar

NEW YORK has achieved a state administrative reorganization as the result of a state constitutional amendment approved by the people at the election of November 3, 1925, and through a series of legislative acts passed in the spring of 1926. In its reorganization New York's plan is comparable with that of Massachusetts in that it is based on a constitutional amendment designating certain departments, although New York, by constitutional change has at the same time materially reduced the number of its elective state officers. In this respect the New York plan marks an advance beyond the plans adopted by Illinois and a number of other states, where reorganization, as purely a statutory creation, left untouched the large number of constitutional state officers. The New York reorganization amendment provides for twenty departments. Although reduced by two in the plan adopted, the number of such departments is larger and their organization more complex than in Illinois and the states that have followed Illinois.

New York may properly be regarded as a leader in the movement for more effective state administrative organization, although the actual fulfillment of plans of reorganization has come late. In 1910 Governor Charles E. Hughes obtained the passage of legislation in aid of a more effective state financial policy. Discussions of administrative reorganization and of budget reform in the New York Constitutional Convention of 1915 attracted the attention of the country. Though the work of that convention was rejected by the people, its proposals have to a large extent constituted the basis for further discussion and for the constitutional amendment adopted in 1925.

Since the defeat of the proposed constitution in 1915, Governor Alfred E. Smith has been the chief advocate of a more efficient and more responsible state administration. Through the Reconstruction Commission, appointed by Governor Smith, a valuable report was published in 1919 on *Retrenchment and Reorganization in the State Government*. The constitutional amendment of 1925 was proposed and adopted largely through Governor Smith's influence.

The amendment of 1925 abolishes the elective offices of Secretary of State, Treasurer, and State Engineer and Surveyor. It omits from the constitution provisions regarding the appointive officers of superintendent of public works and superintendent of state prisons, and also omits provisions regarding the canal board, commissioners of the land office, and commissioners of the canal fund. It provides for twenty departments in the state government, and forbids the creation of new departments, but permits the legislature to reduce the number of departments by consolidation or otherwise. The twenty departments enumerated in the amendment are : (1) Executive; (2) audit and control; (3) taxation and finance; (4) law; (5) state; (6) public works; (7) architecture; (8) conservation; (9) agriculture and markets; (10) labor; (11) education; (12) health; (13) mental hygiene; (14) charities; (15) correction; (16) public service; (17) banking; (18) insurance; (19) civil service; (20) military and naval affairs.

The amendment provides that the popularly-elected comptroller shall be the head of the department of audit and control, and prescribes the duties of the comptroller, while at the same time providing that the legislature shall not assign administrative duties to him. His function is that of financial control and that alone.

By the terms of the amendment the popularly-elected attorney-general is the head of the department of law; the board of regents of the University of the State of New York are made the head of the department of education, and are authorized to appoint and remove at pleasure a commissioner of education. The amendment limits the powers of the already existing state board of charities, provides for the visitation of certain state institutions by the head of the department of mental hygiene, and provides for a state commission of correction of which the head of the department of correction shall be chairman. By the amendment the head of the department of agriculture and markets is appointed in a manner prescribed by law, and the heads of other departments are appointed by the governor by and with the advice and consent of the senate and removable by him in the manner prescribed by law.

The constitutional amendment, although vesting in the legislature a power to consolidate departments, at the same time largely determines the organization of the departments of audit and control, law, education, charities, and correction. Not only this, but the amendment, while providing in general terms that the heads of departments shall be appointed by the governor, makes an exception in

permitting the head of the department of agriculture and markets to be appointed in the manner prescribed by law.

Although leaving large powers in the legislature, the New York Constitution, as amended in 1925, to a large extent determines plans of administrative organization. Such details of administrative organization are of doubtful wisdom in a constitution, but in this case a great mass of detail was omitted, so that the constitutional provisions as to the executive department are much briefer than before. Moreover, the New York Constitution is relatively easy to amend.

The constitutional amendment of 1925 made it the duty of the legislature, at the session immediately following the adoption of the amendment, to provide by law for the assignment of administrative functions to the departments provided by the constitution as amended. Upon the popular adoption of the amendment, the presiding officers of the senate and assembly of the State of New York requested a group of citizens to serve as a commission to make recommendations to the legislature for its guidance in framing suitable legislation. Mr. Charles E. Hughes served as chairman of this commission, and its membership included a number of distinguished citizens of New York, among whom were three other former governors, Nathan L. Miller, Benjamin B. Odell, and Charles S. Whitman. This commission made a detailed report of seventy printed pages and prepared bills embodying its recommendations. The legislature was therefore in a position to act on the basis of matured and deliberate advice in the legislation enacted in 1926. The procedure here employed constitutes a model in this respect. The plan of reorganization was not embodied in a single act, but in a series of twenty-four measures.

The Hughes Commission, and the legislature under its advice, took advantage of the power to reduce the number of departments. Military and naval affairs were placed in the executive department, and the department of architecture was consolidated with the department of public works. Further consolidations, with a corresponding reduction in the number of departments would appear wise, but may have been politically inexpedient.

The commission and the legislature proceeded, in general, on the theory that departments should be headed by individuals and not by boards, though the state board of charities is made the head of the department of charities, and the civil service commission becomes the head of the department of civil service. The regents of the University of the State of New York are under the constitutional amendment the head of the department of education and choose a commissioner of education as their chief administrative officer. The constitutional amendment permits a discretion as to the method of choosing the head of the department of agriculture and markets, and the legislature, under advice of the Hughes Commission, continued the existing council of agriculture and markets which chooses a chief executive officer to be known as commissioner of agriculture and markets. A large part of the state administration is thus put in the hands of commissions, and commissions also have large authority in the departments of labor, taxation and finance, public service, and correction. In the use of commissions perhaps the most serious difficulty in practice will arise in the state board of charities which is now given the function of administering certain institutions, in addition to its duties of visitation and inspection of charitable institutions, although the governor must approve the appointment of the heads of the administrative divisions of this department and may remove them. The combination of advisory and administrative functions usually leads to trouble.

The theory of the New York reorganization is that of more definite responsibility to and control by the governor through heads of departments who in turn control the personnel and affairs of their departments. This theory is carried out in most departments through individual heads of departments, appointed by the governor to hold during his term, and removable by the governor at his pleasure. The exceptions to this plan are numerous. In a number of cases heads of divisions within a department are not appointed by the head of the department. Some departments are headed by commissions. The department of audit and control is purposely independent, and is headed by the popularly elected comptroller. The department of law is headed by the popularly-elected attorney-general, though all functions of giving legal advice are not concentrated into the hands of the attorney-general.

The theory of responsibility to the governor, while not observed in some departments, is strengthened by the creation of the executive department. New York is the first state to seek an effective organization of the functions of supervision directly exercisable by the governor. The head of the executive department, appointed by the governor and removable at his pleasure, may be the secretary to the governor. Military and naval affairs and state police are placed in this department, partly because they do not fit elsewhere. But the governor's supervisory power through this department is primarily exercised by means of the divisions of the budget, standards and purchase, and inter-departmental relations.

With respect to the budget the new legislation is particularly important. An attempted control, largely inoperative and non-existent, through a board of estimate and control composed of executive and legislative officers, is replaced by an executive budget somewhat similar to that of Illinois. The function of revising the estimates and formulating the budget is imposed upon the governor. The Hughes Commission recommended this legislation, but at the same time recommended a constitutional amendment to strengthen the power of the governor. This proposed amendment is a revised and improved form of the constitutional proposal of 1915, known as the Root budget. Its chief purpose is to forbid legislative addition to or increase in items of the governor's budget. It authorizes the legislative addition of new and distinct items, subject to the governor's veto and limits his veto to these items, but he is not to control appropriations for the legislature or the judiciary except through his veto power. The adoption of this proposed amendment would materially strengthen the governor's responsibility for the financial policy of the state. The governor's control of the state administration would also be strengthened by the adoption of the proposed constitutional amendment extend-

ing his term from two to four years. Constitutional amendments for the executive budget and for the extension of the governor's term were agreed to by the legislative session of 1926, and if again approved by the Legislature in 1927, will be submitted to the voters of New York at the election of November, 1927.

Continuity of state policy is important. The Hughes Commission recommendations and the legislation enacted in New York, are based in large part upon the constitutionally provided rules of civil service. Superintendents of charitable and insane institutions, wardens of prisons, and the heads of a number of technical divisions are expressly required by these laws to be in the competitive class of the civil service. Positions of large responsibility are thus placed on the basis of merit. A permanent technical personnel is necessary to an effective conduct of the enlarged functions of state government.

Administrative reorganization is a problem distinct to each state. There are no hard-and-fast rules. The problem in New York is more difficult than in any other state. The constitutional amendment, the Hughes Commission and the Legislature have wisely and practically dealt with the problem as a New York problem. Some phases of the reorganization constitute a mere re-shuffling of the same cards. Much of what has been done can be understood only on the basis of a knowledge of the previous administrative experience of the state and of its governmental and political problems. But New York has taken a long step toward the more efficient and more responsible (and responsive) organization of its administrative service.

DUE PROCESS IN LOCAL ASSESSMENTS

Situation Created by U. S. Supreme Court Decision in So-Called "Archer County Case" from Texas—Special Assessments and General Taxes—Requirements of Due Process—Benefits and Special Tax—Facts and Decision in Above Case—Possible Remedies Under Fourteenth Amendment and State Constitution

By C. S. POTTS*

ON January 4, 1926, the Supreme Court of the United States handed down a decision in the so-called "*Archer County* Case,"[1] holding invalid, as violating the due process and equal protection clause of the Fourteenth Amendment, a statute of the State of Texas which sought to provide for the creation of special districts for building and maintaining improved highways. The case is of great interest to the people of Texas and of other states having similar statutes, and of even greater interest to a large number of investors who had put their money into the sixty or eighty million dollars of road district bonds that have been issued since the law was passed in 1907. It seems worth while, therefore, to examine the decisions of the Supreme Court in their bearing on special assessments for local improvements, with a view to determining what restrictions are placed on the states by the Federal Constitution, and whether a legislative remedy may be found for the serious situation brought about by the recent decision.

I.—Special Assessments Distinguished from General Taxes

It is generally conceded that while the power to levy special assessments is derived from the general taxing power vested in the legislatures of the states, such assessments differ in important particulars from general taxes and are governed in some respects by essentially different principles.[2] General taxes are levied without regard to the benefits received by taxpayer. The only benefits he derives from the payment of taxes are such as come to the members of society generally through the maintenance of the general security and the promotion of the general welfare. The principle on which local assessments are levied is that the persons and lands on which they fall enjoy some special advantages or benefits from the local improvement not enjoyed by the rest of the community. A general tax is an exaction from the tax-payer and leaves him poorer by the amount exacted. A special assessment, if properly adjusted to the benefits received, is not an exaction from the tax-payer's previously owned property, but constitutes a taking, in whole or in part, of the special benefits conferred upon him by the execution of the improvement in hand. "The theory upon which such assessments are sustained as a legitimate exercise of the taxing power," said the New Jersey Supreme Court, "is that the party assessed is locally and peculiarly benefited, over and above the ordinary benefit which, as one of the community, he receives in all public improvements, to the precise extent of the assessment";[3] and the Michigan Supreme Court adds that the *sole* ground for imposing the cost of an improvement upon one part of a municipality is "that the part burdened with the cost receives corresponding benefits which the general public does not receive."[4]

An interesting result of the differences between general taxes and local assessments is that the latter are not included within the provisions found in the constitutions of the states requiring that "taxes shall be equal and uniform" throughout the state, or that property shall be taxed according to its

*Mr. Potts, author of this article, is at present doing graduate work in law in Harvard University.

1. Browning et al v. Hooper et al, No. 256, 46 Sup. Ct. Rep., Advance Sheet, No. 6, p. 141. This decision reversed the holding of the U. S. Dist. Ct. for the N. Dist. of Tex., 3 F (2d) 160 (1925).

2. 2 Cooley on Taxation, 1151 *et seq.*; 1 Page & Jones, Taxation by Assessment, Ch. III; 2 Willoughby on the Constitution, 929.

3. State v. Newark, 27 N.J.L. 190.

4. Detroit v. Recorder's Court Judge, 112 Mich. 588.

assessed or actual value.[5] Nor are special assessments included within constitutional provisions granting exemption from taxation to particular persons, corporations, or classes of property.[6] So, too, the Supreme Court of Texas has held that a local assessment is not a tax within the meaning of the provision of the constitution that allows the homestead to be sold for unpaid taxes.[7]

II. Substantive Requirements of Due Process

In general the legislature enjoys great freedom in determining how the costs of local improvements, such as the paving of streets, the laying of sewers, the irrigation or drainage of farm lands, and the construction and maintenance of highways, shall be paid for. This may be done by general taxes levied on all the property of the state, or of a subdivision of the state, as a county or a city; it may be done wholly by special levies upon the persons or property especially benefited; or it may be done partly by the one method and partly by the other, in such proportion as the legislature or the municipality to which the question may have been delegated may determine. Mr. Justice Hughes, speaking for the Supreme Court in Houck v. Little River District,[8] has set out the various choices open to the legislature in the following language:

> In view of the nature of this enterprise, it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of the state funds raised by general taxation or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. County of Mobile v. Kimball, 102 U.S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The Legislature, unless restricted by the State constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the State alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions.[9]

If the legislature shall determine to cast the expenses of a local improvement upon the locality it has large freedom in the choice of a basis for making the levy. As Justice Hughes says in the extract just quoted, "the legislature may itself fix the basis of taxation or assessment." Elsewhere in the same opinion he says that "the State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or benefits estimated by commissioners."[10] The choice of the legislature in all these particulars will be upheld by the Supreme Court as meeting the requirements of due process, "unless it is palpably arbitrary and a plain abuse," as stated by Justice Hughes in the excerpt just quoted, or is "an instance of discrimination so palpable and arbitrary as to amount to a denial of equal protection of the law,"[11] "a flagrant abuse, and by reason of its arbitrary character a mere confiscation of the private property."[12] Instances of what the court regards as arbitrary and unwarranted distribution of local tax burdens are the following:

1. A provision of the charter of the City of St. Louis providing for paying the expenses of street improvements by local assessment, and an ordinance passed under it levying taxes according to area, resulted in taxing defendant's land to a depth of from 400 to 500 feet, while lots next to it were taxed to a depth of only 100 feet, and those on the opposite side of the street to a depth of only 150 feet. The court, through Mr. Justice Holmes, said:

> It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in greatly unequal proportions not because of special considerations applicable to the parcels taxed but in blind obedience to a rule that requires the result.[13]

2. The Police Juries in certain counties in Louisiana, in organizing a district for the purpose of draining marsh lands along the coast, included in the district and assessed taxes upon a tract of table land upon an elevation known as Weeks Island, some 175 feet above sea-level. It was shown that the land involved would receive no benefit from the improvement. The court, holding the action of the local authorities void, said:

> It is to be remembered that a drainage district has the special purpose of the improvement of particular property and when it is so formed as to include property, which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation.[14]

3. In Thomas v. Kansas City Southern Railway Company, where the board of directors of a district organized to drain swamp lands in Arkansas assessed 57 per cent of the costs of the improvement upon the 3.6 miles of railroad track lying along the edge of the district which was built upon embankments and trestles so that it would be benefited very slightly if at all by the improvement, and assessed the twelve thousand acres of rich bottom land that would be directly and greatly benefited with only 43 per cent of the costs, the Supreme Court, speaking through Mr. Justice Brandeis, held that it was "an instance of discrimination so palpable and arbitrary as to amount to a denial of equal protection of the law."[15]

4. In the case of Kansas City So. Ry. v. Road Improvement District No. 6,[16] the local board assessed the railroad tracks lying within the road district at the rate of $7,000 per mile, or a total of $67,900 for the 9.7 miles lying within the district. Mr. Justice McReynolds, speaking for the court, says:

> To say that 9.7 miles of railroad in a purely farming sec-

5. 2 Cooley on Taxation, 1184 *et. seq.*; 1 Page & Jones, 223 *et seq.* The rule in Texas is in accord with the rule here stated. Roundtree v. Galveston, 42 Tex. 612 (1875); Taylor v. Boyd, 63 Tex. 533 (1885).

6. City of Chicago v. Baptist Theological Union, 115 Ill. 245, 2 N. E. 254 (1886); Barber Asphalt Paving Co. v. City of St. Joseph, 183 Mo. 451, 82 S.W. 64 (1904); Hagar v. Gast, 119 Ky. 502, 84 S.W. 556 (1905). See also 1 Page & Jones, 232.

7. Constitution, Art. XVI, Sec. 50. Higgins v. Bordages, 88 Tex. 458, 31 S.W. 59 (1895); City of Beaumont v. Russell, 51 Tex. Civ. App. 355, 112 S.W. 930. This holding results in an unfortunate marring of the paved streets of many Texas cities, for municipal authorities, as they have no lien on the property for the cost of the paving, usually refuse to pave in front of the home of such home owners as will not agree to pay the special assessment.

8. 239 U.S. 254, 262 (1915).

9. Citing Hagar v. Reclamation Dist., 111 U.S. 701, 709; Spencer v. Merchant, 125 U.S. 345, 353, 356; Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 167, 168; Bouman v. Ross, 167 U.S. 548, 590; Parsons v. D.C. 170 U.S. 45, 52; Williams v. Eggleston, 170 U.S. 304, 311; Norwood v. Baker, 172 U.S. 269, 278; French v. Barber Asphalt Paving Co. 181 U.S. 324, 343; Wight v. Davidson, 181 U.S. 371, 379; Wagner v. Baltimore, 239 U.S. 207.

For similar statements in later cases, see: Valley Farms Co. v. Westchester, 261 U.S. 155, 163; Mo. Pac. R.R. v. Western Crawford Road District, 266 U.S. 187, 190.

10. 239 U.S. 265.

11. Thomas v. Kan. City So. Ry., 261 U.S. 481, 483 (1922).

12. Bronson v. Bush, 251 U.S. 182, 190.

13. Gast Realty Co. v. Schneider Granite Co., 240 U.S. 55, 59 (1916).

14. Myles Salt Co. v. Iberia Drainage District, 239 U.S. 478, 485 (1916).

15. See Note 11 *supra*.

16. 256 U.S. 658 (1920).

tion, treated as an aliquot part of the whole system, will receive benefits amounting to $67,900 from the construction of 11.2 miles of gravel road seems wholly improbable, if not impossible . . . It is doubtful if any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position.

III. Relation of Benefits to Amount of Special Tax

The question has often arisen as to whether a special tax for a local improvement can lawfully exceed the amount of the special benefits conferred upon the land taxed. "There can be no justification," says Judge Cooley, "for any proceeding which charges the land with an assessment greater than the benefits; it is a plain case of appropriating private property for public uses without compensation."[17] In the case of Norwood v. Baker the Supreme Court expressing itself to the same effect, points out that exact equality cannot always be attained:

> In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable; and for that reason excess of costs over special benefits, unless it be of a material character, ought not to be regarded by a court of equity, when its aid is invoked to restrain the enforcement of a special assessment.[18]

These extracts from Judge Cooley and the Supreme Court seem to place the invalidity of the assessment on the principle underlying eminent domain and to regard the tax, in so far as it exceeds the benefits received by the land-owner, as a taking of private property for public use without just compensation. While no compensation is required by the theory of taxation, which is the true ground on which these cases should be considered, the courts reach the same result by regarding the tax, to the extent that it exceeds the benefits received, as a denial of the equal protection guaranteed by the Fourteenth Amendment. So, while the courts recognize the fact that individual cases of hardship will sometimes occur and "must be borne as one of the imperfections of human things,"[19] and while they will not overturn an old and familiar method of assessment because of a "theoretical possibility that there may not be an exact and mathematical relation between cost and benefit in particular instances,"[20] it is now well established that they will declare void any statute or ordinance that requires the arbitrary inclusion within the district of any lands not benefited by the improvement or that imposes upon particular persons or classes of property what the court regards as a substantially unfair or unjust burden. If the benefits are construed to mean the actual increase in the market value of the property resulting from the improvement, special assessments constitute one of the fairest methods of taxation known; without such restriction in the meaning of benefits, local assessments may become burdensome and oppressive, as the cases already referred to clearly show.

17. 2 Cooley on Taxation, 3rd ed., 1255-6.

18. 172 U.S. 269, 279 (1898).

19. Louisville & Nash. R. Co. v. Barber Asphalt Co. 197 U.S. 430, 434 (1904).

20. Butters v. Oakland, 263 U.S. 162, 166 (1923). See also Martin v. District of Columbia, 205 U.S. 135.

IV. Procedural Requirements of Due Process

The principal procedural requirements of due process of law under the Fourteenth Amendment are notice and hearing to the tax-payer whenever the organization of the district and the assessment of the property are committed to local officials. In local improvements a number of questions must be determined either by the legislature itself or by some local agency designated by it. Among these questions are whether the improvement shall be undertaken at all, and if so whether it shall be paid for out of the state funds, or by special assessments on the lands benefited, or partly by the one and partly by the other method. If local assessments are to be levied, someone must determine the boundaries of the district, that is, what property will be benefited and the amount of the benefit received. Now, all these questions may be determined by the legislature itself, or by a municipality having legislative power over the subject, leaving only purely ministerial matters to be handled by the local administrative authorities. In such cases, an unbroken line of decisions holds that no notice and hearing are necessary.[21] The legislative determination is itself due process, say the courts, some giving as the reason that when the legislature itself settles the question of benefits notice would be useless and therefore unnecessary, and others that in such cases the tax-payer has in fact notice and hearing, not in person, but through his elected representative in the legislature. It is only when the *result* reached by such legislative determination, as distinguished from the *process* by which it is reached, is arbitrary and confiscatory, and that the courts will interfere on the ground of denial of due process and equal protection.

On the other hand, if the legislature, instead of acting directly, leaves to a local agency, as a county commissioners' court, or a board of supervisors, or a court of law, or a board of directors specially created for the purpose, the determination (1) as to what lands will be benefited and (2) as to the amount of such benefits, then the tax-payer is entitled to notice and hearing, and a failure to provide them will avoid the statute and all proceedings under it. The Supreme Court of Iowa has stated the requirement of notice and hearing in this way: "Whenever the amount of tax to be exacted depends upon the exercise of the judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded."[22] "And it is not enough," said the Court of Appeals of New York, "that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard."[23] The notice may be given by publication[24] and the requirement for a hearing

21. Williams v. Eggleston, 170 U.S. 304, 311 (1897); Valley Farms Co. v. Westchester, 261 U.S. 155, 164 (1923); Wagner v. Baltimore, 239 U.S. 207, 218 (1915); Spencer v. Merchant, 125 U.S. 345; Parsons v. D. C., 170 U.S. 45; 1 Page & Jones, 210.

The latest word on this subject is to be found in the Archer County case, where the court said:

"Where a local improvement territory is selected, and the burden is spread by the Legislature, or by a muncipality to which the State has granted full legislative powers over the subject, the owners of property in the district have no constitutional right to be heard on the question of benefits."

22. Beebe v. Magoun, 122 Ia. 94, 96, 97 N.W. 986 (1904).

23. Stuart v. Palmer, 74 N.Y. 183, 188, 30 Am. Rep. 289 (1878). See also 2 Cooley on Taxation, 3rd ed., 1238-1241, and case cited; 1 Page & Jones, Taxation by Assessment, 203-207.

24. Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 174-175.

will be satisfied if the tax-payer is permitted to contest the value of his property or the benefits received at any time before the tax becomes a lien on his land.[25] It is even held a sufficient hearing, if, when sued for the tax, he is permitted to attack the validity of the assessment or the amount of the benefits he is alleged to have received.[26] But beyond this the courts will not go, and any statute that fails to provide for notice and hearing at some point in the process of assessing and collecting the tax is certain to be held wanting in the due process required by the Fourteenth Amendment.

V. The Archer County Case

The case that has given rise to the present wide-spread discussion of local assessments began when Browing and others, tax-payers in the proposed road district No. 2, brought a suit in equity in the District Court for the Northern District of Texas to restrain Hooper and others, composing the county commissioners' court of Archer County, from issuing and selling the bonds of the said district. The petitioners sought relief on the ground that the creation of the road district and the enforcement of the tax necessary to pay the interest and create a sinking fund for the retirement of the proposed bonds would deprive them of their property without due process of law in violation of the Fourteenth Amendment. The district court denied the injunction and dismissed the bill,[27] but on appeal this decree was reversed by the Supreme Court in a brief opinion written by Mr. Justice Butler.

The Texas statutes[28] provide that "any county in this state or any political subdivision or defined district, now or hereafter to be described and defined, of a county," is authorized to issue bonds not to exceed one-fourth of the assessed valuation of the real property in the district, for the construction and maintenance of macadamized, graveled or paved roads, and to levy and collect taxes to pay for them. Upon the petition of 50 or more tax paying voters of any defined district, the county commissioners' court is required to order an election to determine whether the district shall be organized and the bonds issued. If two-thirds of the votes cast are favorable, the commissioners' court is required to issue the bonds, after having first levied a tax on all the property, real and personal, within the district, sufficient to meet the interest charges and pay the debt at maturity. The assessments are made on the same valuations and they become a lien on the property in the same way as state and county taxes.

Acting under this statute, in 1924, 74 tax paying voters resident in the proposed district filed a petition asking that the two northern commissioners' precincts of the county be organized into district No. 2, and that $300,000 of bonds be issued for the improvement of certain roads designated in the petition, lying in the central and western part of the proposed district. The court promptly called the election, and more than two-thirds of the votes cast were favorable to the creation of the road district and the levy of the tax. The appellants owned a large amount of land in the northeastern part of the district, and in their petition they assert that their property is tributary to Wichita Falls in an adjoining county, that they use the roads of that county in marketing their produce, and that they would not receive any benefit whatever from the proposed improvements.

The court held (1) that "the proceedings in this case cannot be sustained as the levy of a general tax," but "that the burdens here sought to be imposed on appellants' lands are special assessments for local improvements."[29] (2) That "the Legislature did not create the road district, levy the tax or fix the amount to be raised"; that these important matters were settled by the 74 tax payers in their petition to the commissioners' court, subject alone to the possible veto of the voters at the election; for, says the court, "the commissioners' court has no power to modify or deny; it is bound to grant the petition."[30] And (3) that the law is unconstitutional since it commits to the petitioning tax payers the prerogative of fixing the boundaries of the district and did not provide any opportunity for notice and hearing to the land owners affected. "It is essential to due process of law," said the court, "that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement."

VI. Results of the Decision

(a) On defined districts bonds. It is at once apparent that the decision invalidates the bonds of all "defined districts" organized under the law, whether such districts are composed of one or more political subdivisions of a county, or of any previously undefined body of lands less than the whole county. That this is the necessary result of the decision has been held by the Fort Worth Court of Civil Appeals.[31] But that the same result has been produced where an entire county was chosen as the road district is a matter of serious doubt. The state's Attorney General is quoted in the press as holding that such county bonds have not been invalidated by the decision, but he has refused to approve any additional county bonds until the question is judicially determined—for which purpose a mandamus proceeding has recently been instituted against him in the State Supreme Court.

(b) On county bonds. With reference to the validity of county road bonds the fact should be noted that the Supreme Court did not declare the law void as applied to counties. It had before it a "defined district," which had not existed before and possessed no powers and no functions others than those conferred by the statute in question. It was called into existence for that purpose only

25. Reclamation District v. Evans, 61 Cal. 104; Hagar v. Reclamation District, Ill. U.S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569 (1884).

26. Id. Also Embree v. K. C. & Liberty Boulevard, 240 U.S. 242, 251 (1916); Wells Fargo & Co. v. Nevada, 248 U.S. 165, 168 (1918).

27. Browning et al v. Hooper et al, 3 F (2d) 160 (1924).

28. Rev. Stat. 1911, art 627-641. The statutes with slight modifications reappear in the revision of 1925 as articles 726-752 inclusive.

29. The correctness of this conclusion may well be doubted in view of the prior decisions of the Supreme Court and of the courts of last resort in many of the states, in cases involving a tax levied on all the property of the district, as was the case here. Ogden v. Davies County, 102 U.S. 634; County Commissioners v. Chandler, 96 U.S. 205; Davenport v. Dodge County, 105 U.S. 237; United States v. Dodge County, 110 U.S. 156; Marcy v. Township of Oswego, 92 U.S. 637; Cass County v. Johnston, 95 U.S. 360; People v. Whyler 41 Cal. 351; Shoshone Highway Dist. v. Anderson, 22 Idaho 109, 125 Pac. 219; Hopkins v. Special Road Dist. 72 Fla. 247, 74 So. 310; Griggsby Const. Co. v. Freeman, 108 La. 425, 32 So. 399; Reed v. Howerton Engineering Co. 188 N.C. 89, 123 S.E. 479.

30. For the proposition that the commissioners' court cannot refuse to grant the petition, the Court cites: Higgins v. Vaden, (Tex. Civ. App.) 253 S.W. 877, 878. Id. (Tex. Civ. App.) 259 S.W. 203, 206, and Meurer v. Hooper, 271 S.W. 172, 176.

31. Scaling v. Williams, decided March 27, 1926, but not yet reported.

and would cease to exist when that purpose was accomplished. It was composed of two political subdivisions, to be sure, but these commissioners' precincts are mere election districts, having besides no functions, no officers, and no corporate existence.[32] The county, on the other hand, is a pre-existing municipal corporation, with various governmental powers and functions to perform, one of which is to build and maintain public roads. So it might reasonably be contended that the legislature by the statute was merely conferring upon an existing agency power to issue bonds and levy taxes for a specific purpose; that such tax, being levied ratably on all personal and real property within the county on the same basis as state and county taxes, is a general tax and not a special assessment, and therefore, that no notice and hearing as to benefits are required. Or, conceding that the tax is a special assessment and not a general tax, it may be argued that, where a whole county is incorporated into a district, the Legislature itself, by expressly providing that "any county in this state. . . . is hereby authorized and empowered to issue bonds . . .," has designated the boundaries of the district and thus conclusively settled the question as to benefits.

Admitting the full force of this argument, it hardly seems conclusive. If the Supreme Court could be convinced either (1) that, as regards the county-district, the tax is a general tax and not a special assessment, or (2) that, granted that the levy is a local assessment, the legislature has designated the boundaries and settled the question of benefits, the validity of the county bonds would be established. But it should be noted that some of the arguments given by the Court to show that the tax of a "defined district" is a special assessment, apply with equal force to the tax when levied by a whole county as the road district. Thus the court says:

> *The commissioners' court is authorized to levy general taxes for road purposes up to a stated maximum on each $100 valuation.* Complete Tex. St. 1920, or Vernon's Sayles' Ann. Civ. St. 1914, art. 2242; Const. Tex. art. 8, §9. *The expenditure of the moneys so raised is not limited to any specified roads. And it is significant that, in the case of a road district, the court's duties in respect of the amount to be raised and the lands to be subjected to the charge are purely ministerial, and confined solely to carrying out the will of the petitioners when approved at the election.* Here, on the initiation of individuals signing the petition, a special district was carved out to furnish credit and to pay for specified improvements on designated roads wholly within the territory selected. The purpose was special, and the district will cease to exist as a body corporate upon the payment of the bond debt.

This quotation includes all that the court said by way of showing that the tax in question is a special assessment and not a general tax. It would seem that the portions here printed in *italics* would apply with equal force to the case of a district composed of the entire county. The only argument given by the court that is not applicable to a district composed of a county is the *ad hoc* character of the district involved in the case before the court. Just what weight the court attached to this part of its argument is entirely conjectural. So it seems very uncertain that the court will regard the county tax as a general tax and not a special assessment.

As to the second point, that where the county is the district there has been a legislative determination of boundaries and no notice and hearing are necessary, there seems quite as great uncertainty. If the statute had named the county and stopped there, there would be no doubt, but it did not do that. It left it to the petitioners to say whether the county or some subdivision of the county should be chosen. Not only so, but, if the Supreme Court is right, the petitioners alone can designate the roads on which the money is to be spent and the amount of the bonds to be issued, provided always that the amount does not exceed one-fourth of the assessed valuation of the real property of the county. Thus under the statute, as interpreted by the court, the petitioners alone can determine whether the district shall be the county or less than the county, can designate the roads to be improved, and can fix the amount to be expended. These, it will be noted, are the factors that determine the amount of the tax that each land owner shall pay. Granted these factors, the amount of the tax would follow as a result of a mathematical calculation. Hence it would seem that there is not in any real sense a legislative determination of the vital questions on which the tax payer's burden depends, and hence notice and hearing would be necessary.

If the foregoing analysis is correct there would seem to be only a chance that the Supreme Court would sustain the validity of bonds issued by the counties organized as road districts under the act of 1907. It would, therefore, seem to be the part of wisdom to include county road bonds in any validating legislative remedy that may be decided upon.

VII. Possible Remedies Under the Fourteenth Amendment

"It is generally held that the legislature may, by a subsequent curative statute, obviate the effects of any irregularity or defect in steps in the assessment proceedings with which it could have dispensed in advance.[33] Clearly this is not the case with which we are concerned here, for the legislature cannot dispense with the constitutional requirement for notice and hearing, unless it directly names the districts and fixes their boundaries. The act of 1907, in failing to provide for notice and hearing, is therefore unconstitutional, the districts are non-existent, and the bonds are incurably void. If so, the remedy must be found in a new act under which new districts may be organized for the purpose of issuing valid bonds in exchange for the bonds outstanding. Fortunately the Fourteenth Amendment will not give serious trouble in carrying such a plan into execution. Assuming for the present that the state constitution will offer no obstacles, the legislature can provide for new road districts either by a law requiring the organization of such districts and vesting in the commissioners' court the power and discretion to omit from the proposed district the property of any person who, upon notice and hearing, can show that he will receive no benefits from the improvements contemplated, or by itself establishing districts more or less coterminous with the districts heretofore attempted to be organized. In the one case the constitutional requirement is met by providing for notice and hearing; in the other the need for notice

32. Ex parte Haney, 51 Tex. Cr. Rep. 634, 103 S.W. 1155, Cofield v. Britton, 30 Tex. Civ. App. 208, 109 S.W. 493, 496.

33. 2 Page & Jones, Taxation by Assessment, 1656, and cases there collected. See also St. Joseph Township v. Rogers, 16 Wall. 644, 663; Anderson v. Santa Anna, 116 U.S. 356, 359.

and hearing is obviated by direct legislative determination of the question of benefits.

That the plans here suggested will meet with no serious trouble under the federal due process clause seems fairly evident from the following cases:

1. A New York law, under which a local improvement was executed, the costs assessed against the property benefited, and many of the assessments were paid, was declared unconstitutional because it did not provide for notice and hearing as to benefits.[34] Thereupon the legislature passed a new act ordering the local authorities to assess the remaining costs and expenses of assessment upon the isolated parcels of land that had not paid the tax originally assessed. This was a legislative determination that the lands were benefited, but the act provided for notice and hearing as to the amount of the benefits received by each piece of land, This act was sustained by the Court of Appeals of New York[35] and by the Supreme Court of the United States,[36] the latter court saying:

> The legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited.

2. In 1905 the legislature of New York provided for the construction of a sewer in Westchester County, and directed the county supervisors to prepare maps of the district and after notice and hearing to assess the costs of construction upon the lands benefited. In 1917, some five years after the completion of the enterprise, the Legislature, disregarding the maps and what the supervisors had done, designated the boundaries of the district and directed "assessments upon all lands therein according to value, including improvements—all parcels to be treated alike." This act was strenuously attacked as unjust and as depriving of property without due process, but was unanimously upheld by the Supreme Court.[37]

3. A like result was reached in Kansas City Southern Ry. v. Road District.[38] Here a road district was laid out under a general law of the State of Arkansas, the assessments were made and approved by the county court, but the railway company, appealing to the circuit court, attacked the assessment as purely arbitrary and grossly unequal and unfair. Pending the appeal the Legislature passed a special act "recognizing the creation and boundaries of the district, approving the plan for the improvement of the road, confirming the assessment and benefits as sustained by the county court and declaring that the assessment 'fairly represents the benefits that will accrue' to the railway property and other tracts in the district." The railway then extended its attack to the special act, but the Supreme Court, holding that the plaintiff had failed to sustain the charge that the assessment was "palpably arbitrary or unreasonably discriminatory," sustained the legality of the act as a valid legislative determination of benefits and of boundaries.

From these cases it seems fairly apparent that the requirements of the Federal Constitution will be met by the adoption of either form of statute suggested above. It is immaterial that the improvements in many of the Texas counties and road districts have already been completed and have been partially paid for.[39]

VIII. Possible Remedies Under the State Constitution

It is not proposed here to go into any detailed study of the Constitution of the State of Texas, but it seems desirable to say a word as to the legality of the two forms of curative statute suggested above. The constitutional provision under which the Legislature must act was adopted in 1904 for the express purpose of providing for the construction of highways by the issue of road bonds. It provides that "under legislative provision," any county or any political subdivision of the state or any defined district may, upon a two-thirds vote of the property taxpayers resident therein, issue bonds and levy the necessary taxes for the construction of highways.[40] Under this broad authority, it seems clear that the legislature, in the absence of restrictive provisions in other parts of the Constitution, would be able to adopt either of the forms of curative statute mentioned above. A general law requiring the commissioners' court, in all counties where districts were organized under the former law, after notice and hearing, to call an election to determine whether bonds should be issued and taxes levied, would avoid the constitutional restrictions on local and special legislation,[41] and, it is believed, would not offend against other provisions of the constitution. With reference to the organization of future districts the act could be left in its present form except for an amendment providing for notice and hearing.

In the other form of statute suggested it would be necessary for the legislature to name each district heretofore organized and to fix its boundaries. While such an act is a local or special law it may fairly be assumed that it would be relieved of the prohibition leveled against such legislation, for the last sentence of an amendment of the constitution adopted in 1890 declares that "the Legislature may pass local laws for the maintenance of the public roads and highways, without the local notice required for special or local laws."[42]

It seems fairly clear, therefore, that the legislature has constitutional warrant for adopting either form of statute suggested above that may appear most feasible. It has been suggested that the legislature, by making the boundaries of each district the same as those of the old district and by declaring the prior election by which the old district was sought to be organized to be a regular and valid election, may avoid the necessity of holding a new election in each district and the consequent risk of an unfavorable vote.[43] The value of this suggestion may well be doubted. In the cases cited in the footnote the elections were held only a few months before the validating statute was passed, and in preexisting, permanently organized municipal corpora-

34. Stuart v. Palmer, note 23 *supra*.
35. Spencer v. Merchant, 100 N.Y. 485.
36. Id. 125 U.S. 345 (1888).
37. Valley Farms Co. v. Westchester, 261 U.S. 155 (1923).
38. 266 U.S. 379 (1924).
39. Seattle v. Kelleher, 195 U.S. 351; Wagner v. Baltimore, 239 U.S. 207 (1915); Valley Farms Co. v. Westchester, 261 U.S. 155, 164 (1923).
40. Art. III, Sec. 52.
41. Art. III, Sec. 56.
42. Art. VIII, Sec. 9. See Dallas County v. Plowman, 99 Tex. 509, 91 S.W. 221 (1906).
43. Authority for this suggestion is supposed to be found in St. Joseph Township v. Rogers, 16 Wall. 644 (1872), and Anderson v. Santa Anna Township, 116 U.S. 356 (1886).

tions. In Texas, the elections in many road districts were held ten or fifteen years ago and for the purpose of determining whether a road district should at that time be organized. It would involve a broad assumption to hold that such an election fairly represents the will of the voters at the present time. Besides, the adoption of the suggestion would prevent the legislature from exercising any discretion in fixing the boundaries of the districts, and, in a future case, might render its action subject to attack on the ground that it was not a bona fide legislative determination of boundaries and benefits. On the whole, it seems to the present writer unwise to attempt to avoid holding new elections in all the road districts.

IX. Power of New Districts to Assume the Debts of the Old Districts

One more question requires brief notice. May a district created under a curative statute legally assume the debt of an illegally organized district and exercise the taxing power to discharge the outstanding bonds? In the absence of any restrictive provision in the state constitution there would seem to be little difficulty in giving an affirmative answer. It has been repeatedly held that a mere moral obligation will justify an exercise of the taxing power.[44] Thus, in New Orleans v. Clark, where the legislature of Louisiana had ordered the City of New Orleans to pay certain invalid bonds issued in aid of a gas company, the Supreme Court, speaking through Mr. Justice Field, said:

> The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear.[45]

In the case in hand, however, we have a constitutional provision to the effect that the Legislature shall have no power to "pay or authorize the payment of any claim created against any county or municipality of the state under any agreement or contract made without authority of law."[46] No Texas case has been found construing this provision, but a similar provision in the constitution of California was held to render unconstitutional and void an act of the Legislature that sought to provide for the payment of just claims for labor performed and materials furnished under a drainage statute subsequently declared void.[47] However, it is not believed that the same result would be reached under the provision in the Texas constitution, for the context shows that it was intended to prevent the granting of any "extra compensation, fee or allowance to a public officer, agent, servant, or contractor, after service has been rendered or a contract has been entered into, and performed in whole or in part." Surely no court would hold this provision to have been intended to prevent the repayment of a loan where the claimants' money had been spent on a valuable improvement for the benefit of the district. From earliest times cases of unjust enrichment have been made the strongest appeal to courts of equity, and it is believed that no court would convert a wise provision intended to protect the people from fraud and imposition into an instrumentality for working fraud upon others.

X. Summary and Conclusions

The following conclusions seem fairly warranted:

1. That if the legislature itself determines what lands are benefited and the amount of such benefits, no provision for notice and hearing is necessary, and such legislative determination will not be disturbed by the courts on the ground of due process unless the result reached is so palpably arbitrary and discriminatory as to amount to a denial of equal protection of the law.

2. If the determination of benefits or the valuation and assessment of the property is left to local agencies, notice and hearing are a *sine qua non*.

3. The Texas statute involved in the Archer County case violated the requirement of notice and hearing, and was clearly void as to the "defined districts." It probably is not void as to the county bonds, but the uncertainty is so great that county bonds should be included in any legislative action taken looking to the correction of the situation.

4. The legislature can provide for the creation of districts—with boundaries practically coterminous with the old districts—for the issue of new bonds in place of the old. This may be done by a general law requiring the commissioners' court in all counties where road bonds have been issued to hold a hearing as to benefits and the amount of bonds to be issued and to call an election for that purpose; or by itself naming the counties and districts, fixing the boundaries of the latter, determining the question of benefits and fixing a date for the election, or requiring the commissioners' court to fix the date.

5. The new bonds, if authorized by the two-thirds vote required by the constitution, may be substituted for the outstanding bonds, and the moral obligation to pay the existing debt will sustain the exercise of the taxing power to pay off the new bonds.

In conclusion it may be said that the subject of special assessments does not involve many especially difficult constitutional problems and the requirements of the due process clause are not especially hard to meet. Reasonable care on the part of the Legislature in providing for notice and hearing, and an honest endeavor on the part of local administrative authorities to deal fairly with all classes of property in assessing benefits are sure to meet with the approval of the Supreme Court.

Contributions

The articles and letters appearing in the JOURNAL are signed with the names or initials of the writers. The Board of Editors assumes no responsibility for the opinions contained therein beyond that implied by the expression of the view that the subject is worthy of the attention of the profession.

44. Fuller v. Inhabitants of Groton, 11 Gray 340 (Mass. 1858); Friend v. Gilbert, 108 Mass. 408 (1871); Briggs v. Whipple, 6 Vt. 95; Brewster v. Syracuse, 19 N.Y. 116 (1859); Board of Education v. McLandsborough, 36 Oh. St. 227 (1880); Blanding v. Burr, 13 Cal. 343 (1859). But see *contra* Garrett v. Froehlich, 118 Wis. 29 (1903).

45. 95 U.S. 644, 653 (1877). This case was quoted and followed in United States v. Realty Co., 163 U.S. 427 (1895). See also United States v. Cook, 257 U.S. 523 (1922).

46. Art. III, Sec. 53.

47. Miller v. Dunn, 11 Pac. 604 (1886).

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR, MANAGER
Journal Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois.

THE ENDLESS BATTLE FOR CONSTITUTIONAL PRINCIPLE

The death of Rome G. Brown at Minneapolis on May 22 recalls one of the great fights which the American Bar Association made in vindication of constitutional principles. It was one with which his name was long intimately associated. As chairman of the committee to oppose the judicial recall, with its allied heresy, the recall of judicial decisions, Mr. Brown gave years of active and efficient service to the work of counteracting the spread of these ideas. His activity during this period was an apt illustration of a man following what Mr. Alfred Z. Reed has styled "the public profession of the law." While lawyers were interested professionally in the preservation of a sound judicial system, they were working in this instance for something far more important than any class or professional interest—the interest of the country as a whole. And while the American Bar Association was by no means the only force marshaled to oppose the judicial recall, there is every reason to believe that its activities were of far-reaching influence.

The work of the committee carried on under the chairmanship of Mr. Brown was in no sense dilettante or academic. It got right down to business. In reporting for the committee at the meeting in 1913 in Montreal, Canada, he stated that "the committee to oppose the judicial recall under the resolution of 1911 has been in session for the entire year. This does not mean occasional sessions nor even continuous sessions. We have been in session constantly, organized and working throughout the year, to fulfil the duty imposed on us—to expose the fallacy of the judicial recall. . . Our committee has circulated pamphlets containing discussions against the judicial recall throughout the United States, placing them where they would be most accessible to students of the subject and where they would do the most good. For instance, we have sent them to every library in the country, to every one of the 25,000 students in the law schools of the United States, to editors, lawyers, judges, members of legislatures, members of debating teams who had this subject under discussion, and to citizens generally. During the past year, thus using eight different discussions, we have distributed over 350,000 pamphlets. . . We have furnished speakers and debaters from among our number and from the Bar in general. We have furnished speakers before universities, law schools, bar associations, economics clubs, business men's associations, and procured the publication of articles in different periodicals. We have also engaged in the contests in legislatures, courts and at the polls to prevent the spreading of this fallacy."

It is well to recall from time to time the achievements of the men of this association in the past because it renders a merited honor to their memory and also because it casts a light on the problems and the duties of the present. The recall of judges and judicial decisions is, one would naturally say, dead and no longer an issue. That may be true as regards the particular proposal itself. Long since the last mutterings of that particular method of solving a problem by creating an infinitely greater problem died on the silent air. But it is well to remember that this proposal was merely the surface symptom of an attitude which has continued and bids fair long to continue in many quarters: we mean an impatient opposition to the maintenance of the judiciary of the state and nation in its full constitutional powers. Stated in this fashion, it is quite clear that the fight which this Association was recently called on to make against amendments designed to make congress the final judge in constitutional matters instead of the United States Supreme Court, and the other fight which it has made and is still making against efforts to cripple the efficiency of the federal courts of the country by limiting the power of the judges, are closely akin to the contest with which Mr. Brown's name is associated.

We may carry the argument a step further and say, what is undoubtedly the fact, that support of the judicial recall and of the

other proposals just mentioned, springs in many quarters from an impatience not so much with a particular restraint as with constitutional restraints in general. The judicial recall and plans to take away from the U. S. Supreme Court the power of final decision in constitutional questions simply furnish the particular occasion for the manifestation of ideas which, whether those who profess them know it or not, tend to the breaking down of our democratic representative government under a written constitution. A good many do know it and their purposes are thinly veiled. But a greater number of otherwise good citizens do not understand the immediate tendency and the danger of ultimate catastrophe which lurk in the nostrums which glib-tongued orators from time to time bring forth for their consumption.

Viewed in this way, we see that the problem which the committee appointed in 1911 was called on to deal with is the problem that has likewise confronted subsequent committees. The surface aspect varies but the essential thing remains. As has been said, "the more it changes, the more it is the same thing." In particular, the American Citizenship Committee is at present dealing with the same old problem of impatience with constitutional restraints—complicated as it has lately been with the problem of an unassimilated alien citizenship. Fortunately its aims and methods go deeper toward the foundations than those of committees formed to deal with specific symptoms. A proper understanding and appreciation of the Constitution, such as it is endeavoring to inculcate by many and most ingenious means, is the cure not only for one specific symptom but for each recurring vagary. It goes to the roots of the disease of impatience with wise constitutional restraints. It tends to cut the ground from the feet of the shallow demagogues and the self-interested seeker after preferment. Vagaries allied to those of the past will no doubt spring up from time to time in the future, but they should find the soil by no means so fertile as of old and their extermination should be rendered so much the easier because of the work it is doing.

To return to the question of the judiciary, the fight which Mr. Brown's committee made and the contests that have recently been carried on serve again to emphasize the fundamental duty and function of the Bar as the supporter of the judiciary in its full constitutional powers. The judiciary remains, as it was said in earlier days, the weakest of the three coordinate departments in many respects. It has no patronage at its disposal. It is chosen by the two coordinate branches in the federal system. Its salaries are, except in rare cases in the states, fixed by the other two branches. It is only in the majesty of its functions as the main support of a government of laws and not of men, as the conservator of the interests of the years against the passions of the moment, that it equals the others. But it has been amply demonstrated that to discharge these functions effectively, to remain protected against the short-sighted efforts of those who would hamper it, there is need of the support of a united Bar. We say a united Bar designedly, because it is only an organized Bar which can render support effectively. The American Bar Association thus adds to the already numerous reasons for a greater, more inclusive and more effective organization, the necessity of standing for the powers of the judiciary against the constantly recurring efforts to impair them.

ALTON B. PARKER

Of all the incidents of Judge Parker's life the one which most readily comes to the public mind is his famous "gold standard" telegram to the national convention which had just nominated him for president. It is fitting that it should, for in that one dramatic act he summed up and committed to the lasting recollection of his countrymen the essentials of his sterling character. Honesty, straightforwardness, refusal to indulge in sham and pretense—these are the qualities for which Judge Parker had long stood in his own state before his possession of them had been so dramatically demonstrated to the nation as a whole. In paying especial attention to this incident, in the memorial printed in another part of this issue, Judge O'Brien indicates a realization of its significance as a showing-forth of the man himself. It is well to be remembered as an able lawyer and a just judge—and as these Judge Parker will long be remembered. It is well to be recalled as a president of the American Bar Association, as a leader in the efforts of the men of the law to maintain high professional standards and to improve the administration of justice. He was all this. It is well to go down in history as the chosen candidate of a great national party for the highest office in the land. But better than all this, as it seems to us, is it to be recalled instinctively by millions of his fellow men as a man of high moral courage, of incorruptible honor—as a man whose high character steadily kept pace with high achievements.

THE UNITED STATES BOARD OF TAX APPEALS

A Distinct Innovation in the Administration of Federal Revenue Laws for Protection of Taxpayers—Large Powers of Officers Charged With Assessment and Collection of Taxes —Great Importance of Presentation of Proper Evidence to Board—A Lawyer's Task—Summary Assessments and the Burden of Proof—Modifications in 1926

By Albert L. Hopkins

Of the Chicago and Washington, D. C., Bar

THE United States Board of Tax Appeals is a distinct innovation in the administration of the Federal Revenue Laws. It was created by Congress in the Revenue Act of 1924, approved June 2, 1924, and continued in the Revenue Act of 1926, approved February 26, 1926. The Board is still more or less in an experimental state, but the first year and a half of its operation was sufficiently satisfactory that Congress saw fit to continue the Board and to increase its powers and put it on a permanent basis.

The Board of Tax Appeals was created as a protection to taxpayers. To effectuate that purpose, it was made an independent body, and not a part of the Treasury Department.[1] Congress felt, not without cause, that taxpayers should be afforded some measure of protection from summary or arbitrary action by the Bureau of Internal Revenue.

The officers of the United States charged with the assessment and collection of taxes have had great powers—abnormal powers when compared with those vested in like state officials. The Commissioner of Internal Revenue has the power of assessment. An assessment resembles a judgment, and in the manner in which satisfaction may be enforced, is often more serious than a judgment.

The collection of an erroneous or unfounded assessment cannot be enjoined,[2] regardless of consequences to the taxpayer.[3] In fact, injunctive relief appears to have been denied where the Commissioner sought to satisfy A's tax liability by summary distraint on the property of B.[4] The Commissioner has had not only the power to charge fraud, but to find fraud and to collect fraud penalties. It has been contended on behalf of the Commissioner that he may not be enjoined from collecting certain fraud penalties, the argument resting on the theory that such penalties are part of the tax. The question has not been satisfactorily settled.

The Commissioner of Internal Revenue must necessarily and does function through a great many agents, and it is impossible for every case to receive the careful consideration which its importance justifies. It was not unlikely that such broad powers would be abused. The assessment of taxes and often of penalties, followed by attachment of bank accounts, perfecting of liens on real estate, distraint, and other summary proceedings, are serious matters. Unfortunately, it has been true in many cases that summary proceedings have been instituted without proper foundation. It was inevitable that the situation would become oppressive.

Prior to the high income and excess profits taxes occasioned by the War, these questions were not of serious concern to most people, for taxes were low. The tax rates, however, for 1917, 1918 and succeeding years were very high. As many a business organization and individual has learned, Federal taxes became one of their most serious problems. It must be said that the Bureau of Internal Revenue, in the early years of the high income and excess profits taxes, took a fair and even a liberal attitude toward the taxpayer. The Commissioner probably obtained a better caliber of men during the war than he can obtain today. This was due in part to the fact that many able lawyers, accountants and business men were willing to make sacrifices to serve the Government at that time. The civil service classifications undoubtedly handicap the Bureau in securing competent men, and these rules are probably more rigidly in force at the present time than they were during the War years. During the early years of the excess profits taxes, those in authority in Washington realized that it would be disastrous to business men and taxpayers generally if all of the recommendations and proposed assessments of field agents were accepted without question. Some of the audits were hasty, and the recommendations ill considered. Many of the field men were not competent. A few played the part of detectives, often on the theory that promotions depended on how much additional tax they could recommend. A great many grotesque and ridiculous recommendations resulted. Fortunately, the officers in Washington did not hesitate to overrule the field recommendations, and were ready to reach fair adjustments in each case. It is a fact, however, that there have been cases, particularly where fraud was charged, in which assessments, attachments and attempted collections were made utterly without foundation in fact, with disastrous consequences to taxpayers. Unfortunately, arbitrary methods are still employed.

Congress and Commissioners of Internal Revenue have created from time to time various appel-

*This paper was read before the Law Club of Chicago in November, 1925. A few revisions have been made since the passage of the Revenue Act of 1926, but no attempt is made to analyze the 1926 modifications in detail.

1. Sec. 900 (k) of the Revenue Act of 1924 provides: "The Board shall be an independent agency in the executive branch of the Government."

2. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (R. S. Sec. 3224).

3. There are a few decisions and dicta that collection may be restrained in "exceptional circumstances." The Courts, as a practical matter, have whittled this down to nothing. Distrained property is not repleviable. R. S. Sec. 934.

4. See Waldron v. Poe, 1 F. (2d) 939. Compare Long v. Rasmussen, 281 Fed. 238; Pool v. Walsh, 282 Fed. 620.

late bodies within the Bureau in attempts to deal with the situation. An Advisory Tax Board was created by Congress in the Revenue Act of 1918.[5] The Commissioner, under power given him in the Act, discontinued this body in the latter part of 1919.[6] Later, certain employes in the Bureau of Internal Revenue were selected to form another appellate body called, "The Committee on Appeals and Review."[7] The membership of this body increased rapidly. It functioned fairly well, particularly in the early days, and was a real protection to taxpayers from arbitrary action by Bureau employes of immature judgment or experience. The Committee was helpful, but not sufficiently so to provide a solution to all of the problems of tax adjustment. Like the earlier and contemporaneous appellate bodies, it was part of the Bureau of Internal Revenue.

These appellate bodies, the Solicitor's Office and the Income Tax Unit, had built up a body of administrative "case law" consisting of a mass of rulings, published and unpublished. Many rulings were inconsistent with other rulings, and occasionally with Court decisions, particularly with those of the lower Federal Courts. Other rulings were archaic, in conflict with good business practice or with a sound construction of the taxing laws. The Appeals Committee and the Review Division of the Solicitor's Office were too much inclined to regard these rulings, *particularly those in favor of the Government*, as precedents, and declined to consider cases de novo when administrative rulings could be found. It was possible to escape completely from the errors of the past only by creating an appellate body like the present Board of Tax Appeals, which would not consider itself bound by former rulings. Perhaps the strongest argument for the Board of Tax Appeals is that it is free to disregard entirely the return filed by the taxpayer when it does not reflect the actual facts; that it is not at all interested in the history of the case within the Bureau prior to the appeal; that it is not controlled by the rulings and practices of the Bureau, and that it attempts to ascertain the true deficiency, if any, guided solely by the evidence adduced before it and the appropriate Revenue Law.[8]

There can be no question that taxpayers should be given a hearing on the merits before some such independent tribunal before they are subjected to the oppressive measures attendant upon summary assessments and collection of taxes. True, formerly the taxpayer might file a claim for refund, and in case it was denied, sue for the recovery of his money. But payment of the money in the first instance too often meant ruin. Theoretically, interest is adequate damages, but usually it is inadequate.

The theory has been that collection of the revenue is essential to the continuance of governmental functions, and, therefore, that there must be no delay in payment of taxes. Though Congress has provided that the collection of taxes shall not be enjoined,[9] it is believed that the Federal Courts have stressed unduly the failure of necessary revenues if injunctions could be had, and have applied the statute with unnecessary rigor. Illegal collection of taxes are enjoined in the state courts, without dire results. The judge would decide, as in any other injunction suit, whether or not there was reasonable cause for interference by the Court. An injunction would not issue as of right. It is certain that situations will arise in the future, as in the past, under which the Court should not hesitate to enjoin the Collector and the Commissioner. The statutory provision against such injunctions should be modified.

. . . .

The Board has jurisdiction to hear and determine appeals from proposed additional income, excess profits, estate and gift taxes.[10] Under the 1926 Act, the Board may determine overassessments in cases properly before it. Under the 1924 Act, and in all cases tried and submitted to the Board prior to the effective date of the 1926 Act, the determination of the Board was not conclusive. If the ruling of the Board were in favor of the taxpayer, the Internal Revenue Bureau was prevented from collecting summarily, but if he cared to do so, the Commissioner had to bring suit. In such a case, the Board's findings of fact were prima facie correct. If, on the other hand, the Board's decision were in favor of the Commissioner, the taxpayer must pay or be subject to direct distraint. His remedy was a claim for refund, and upon rejection, a suit in the proper court. The Revenue Act of 1926 provides that all cases tried subsequent to the effective date of that Act are subject to direct review by the Circuits Courts of Appeal or the Court of Appeals of the District of Columbia. Either the taxpayer or the Commissioner may appeal, and the venue of the appeal is either in the Court of Appeals of the District of Columbia or in the Circuit Court of Appeals for the circuit in which the taxpayer resides. Such appeal is on the record made before the Board, and is not a trial de novo, as was the litigation prior to the 1926 Act.

Under the statute, the Commissioner is required to give sixty days' notice of his determination of the additional tax, and the taxpayer may appeal to the Board within the sixty days.[11] The filing of the appeal within the time limited is jurisdictional.[12] The appeal must be on file with the Board within the sixty days.[13] Under the 1924 Act, if the sixty days expired on a Sunday or a holiday, there was no extension. The Board dismissed appeals that were not filed within the sixty days. The 1926 Act provided for an extra day if the sixtieth day were on a holiday or Sunday. It is well, therefore, to take particular care that appeals are actually placed on file in Washington within the period. Mailing is not sufficient. Any delay is at the taxpayer's risk. Since the date on the deficiency

5. Sec. 1200 (d). The Board was established March 14, 1919.
6. Oct. 1, 1919.
7. For a time the Appeals Division of the Solicitor's Office had concurrent jurisdiction with the Committee. In 1923 there was a Special Committee on Appeals which considered cases involving less than $2,500.00.
8. If it is urged that the Board, by following its own decisions, as precedents, is itself building up a body of Federal tax law, the answer is that the body of law is being built, not on decisions of a judge, who at the same time represents a party to the dispute, but on decisions of a body as disinterested as any Federal Court, and then only after the orderly production before it of the evidence in the case and arguments both by the taxpayer and the Government as to the law to be applied. Several centuries of judicial experience have failed to disclose a more satisfactory method of handling legal controversies. The common law itself developed in exactly that same manner. Under the 1924 Act there is direct review of the Board's decisions by the Appellate Federal Courts.
9. See note (2) above.
10. The Revenue Act of 1924, Sec. 900 (e); Appeal of Aldine Club, 1 B. T. A. 710.
11. Revenue Act of 1924, Sec. 274, 279, 308, 312.
12. The Board decisions to this effect are numerous. See *Appeal of Sam Satovsky*, 1 B. T. A. 32; *Appeal of Hatch & Bailey*, 1 B. T. A. 25; *Appeal of William Frantge & Co., Inc.*, 1 B. T. A. 36; *Appeal of Hurst, Anthony & Watkins*, 1 B. T. A. 26; *Appeal of United Telephone Co.*, 1 B. T. A. 450. Since the issue is jurisdictional, the Board will consider it of its own motion. *Appeal of S. H. Stange*, 1 B. T. A. 810.
13. See cases cited in preceding note.

letter and the date of mailing may not be the same, it is advisable to preserve the envelope. Since the Commissioner naturally will not give a regular sixty-day notice in cases in which he denies the jurisdiction of the Board, the taxpayer and his attorney must be upon the alert to recognize a final determination and to appeal. The appeal is from the "final determination" by the Commissioner, whatever form it may take. It has been held that jurisdiction may not be conferred on the Board by consent.[14]

We have now had nearly two years' operation by the Board of Tax Appeals. Up to July 1, 1926, 18,000 appeals were filed. Approximately 10,000 cases have been tried and submitted to the Board, and 9,000 cases have been decided. Roughly speaking, about half the cases have been decided in favor of the taxpayer and about half in favor of the Commissioner. Many of the victories of the Commissioner have been on motion because the appeal was not filed within the sixty days.[15] Still more were based on the failure of the taxpayer to produce competent evidence. The proper assembling and presentation of evidence is of the greatest importance in cases before the Board, and will be referred to later.

The original members of the Board were appointed by the President in July, 1924. The appointees elected a Chairman. Rules of practice were prepared, and the Board began hearings in August, 1924. The organization of the Board was accomplished in a remarkably short time. The Act authorized the appointment of 28 members for the first two years, after which time the number was to be limited to seven, who were intended to compose a permanent Board. Of the number authorized, twelve were appointed immediately. Five were appointed from the Bureau of Internal Revenue. All but three of the twelve had been employed in the Bureau at some time or other. Four additional members were appointed prior to the 1926 Act.

A permanent Board of sixteen members was appointed in June, 1926, persuant to the Revenue Act of 1926. The term of office is twelve years. The salary is Ten Thousand Dollars a year. It was provided that the first appointments would range from two years to ten years, so that no large percentage of the Board would be finishing their term in any one year.

The personnel of the Board, on the whole, has been very good. Most of the members were familiar with tax problems. They have performed their duties conscientiously, both in attempting to arrive at the right result and in handling creditably a large volume of difficult work. A matter of a few months' delay is not particularly shocking to lawyers practicing in some of the larger cities. However, the Board should not get so far behind as to subject itself to the criticism that it is delaying collection of taxes. Some of the fault in this respect is attributable to the Bureau of Internal Revenue. There has been a tendency to avoid responsibility by deciding against the taxpayer and forcing him to appeal to the Board. I understand, however, that the Bureau has or is contemplating taking steps to remedy this situation. In certain cases now there may be negotiations even after the sixty-day letter has issued with a view to effecting an adjustment of the tax within the Bureau. The Bureau, however, should go much further in correcting its own mistakes and stop shifting its responsibility to the Board of Tax Appeals.

Procedure and trial before the Board is along lines familiar to the practicing lawyer. If the attorney really understands the subject matter and knows the points he wishes to raise, it is not difficult to prepare a petition. A statement of the points involved, a short statement of facts, and a statement of the relief sought in general constitute the petition. The Commissioner of Internal Revenue is required to make specific answer to the points raised in the petition. In the earlier answers the Solicitor of Internal Revenue, in most instances, merely filed general denials, seldom admitting more than the determination of the deficiency and the corporate capacity or citizenship which were necessary elements to the levying of any tax at all. The practice of the Solicitor (now General Counsel) in this respect was a subject of more or less criticism, and has been corrected.[16]

When the answer is filed, the case is at issue and may be set for hearing. The trial itself consists of opening statements by the representative of the taxpayer and the attorney for the Commissioner, the introduction of evidence and closing arguments. The taxpayer, on ordinary issues, has the burden of proof. Evidence is introduced as in courts of record, particularly equity courts. The 1926 Act provides that the rules of evidence shall be those in effect in equity courts of the District of Columbia. The lawyer with trial experience naturally has an advantage in matters of evidence. The trial is de novo. The proceedings which have taken place in the Bureau prior to the appeal are not a part of the record. Testimony desired by either side must be introduced in the usual manner. A complete record is made up upon the testimony so introduced. Oral argument may be made after the close of the testimony, proposed findings of fact must be filed, and upon request of counsel, briefs may be submitted.

Perhaps the most important thing before the Board of Tax Appeals is "evidence." The appeal is by the taxpayer, and since the trial is *de novo*, the Board takes the position in the ordinary case that the entire burden is on the taxpayer. In other words, the Commissioner's finding of a proposed additional tax is prima facie correct. Therefore, the taxpayer must secure competent legal evidence and see that it is properly introduced in the trial before the Board. This is familiar ground, to lawyers. There is no doubt, however, that more cases before the Board have been lost because of failure to introduce competent evidence than for any other reason. The Board took the position under the 1924 Act that inasmuch as its findings of fact were to be prima facie correct in court, the evidence upon which it made decisions should be received only in accordance with recognized principles of law. As stated before, the matter is now regulated by statute.

A large part of the tax practice within the Bureau of Internal Revenue has been conducted by

14. Appeal of Mohawk Glove Corporation, Docket No. 2295, decided Nov. 9, 1925.

15. See Note 12.

16. The Revenue Act of 1926 abolished the office of Solicitor of Internal Revenue and substituted therefor the position of General Counsel of the Internal Revenue Bureau. The Solicitor of Internal Revenue was an officer of the Department of Justice. The General Counsel is an officer of the Treasury Department.

accountants. Some practice has been conducted by persons who, being neither accountants nor lawyers, could qualify only as "agents." The Board of Tax Appeals admits to practice before it both lawyers and certified accountants. The question of who should be admitted was quite a problem for the Board. With one exception, the members of the Board are and have been lawyers. Proceedings are conducted very much as in court. Practice before the Board is primarily a matter for lawyers. Accountants perform important functions in the preparation of cases for trial, but the actual conduct of the hearing is indisputably a legal proceeding, to be handled by those trained in the law. The Commissioner of Internal Revenue is represented before the Board only by lawyers. On the other hand, it appeared advisable, for practical reasons, not to exclude accountants from practice. The admittances, however, were limited to certified accountants. This brought a protest from some who were excluded. There are a great many reputable accountants who are not certified accountants. Only citizens of the United States may be certified accountants in this country. The matter has been the subject of considerable discussion in the American Institute of Accountants, but so far, the majority of the members of the Institute have supported the position taken by the Board. There have been trials before the Board where an accountant who had made an examination of the books offered to read his report or to state the result of his examination. The Board has excluded such offers, frequently deciding the case in favor of the Commissioner for lack of evidence. Many accountants fully realize the wisdom of leaving these trial matters to lawyers. They know that there are legal as well as accounting questions in the adjustment of taxes, and have declined to attempt the practice of law. Others have taken the position that the entire matter of income and excess profits taxes is an accounting problem, and have advised their clients that lawyers were unnecessary. The chief stumbling block in Board practice to those untrained in the law is in the matter of assembling and introducing evidence. It may be that many accountants have developed themselves into good lawyers, but many have not, and in such cases the clients will suffer.

Depositions may be taken either by the taxpayer or the Commissioner. It is a question of policy, as in any litigated case, whether testimony should be taken by deposition or by witnesses at the hearing.

The Solicitor of Internal Revenue undoubtedly has been handicapped in the production of evidence. In most cases, he relies entirely upon cross-examination, hoping to win by a weakness in the taxpayer's case. On questions of law, of course, he is at no disadvantage.

In the earlier days of practice before the Board, the attorneys for the Commissioner tried to introduce revenue agents' reports and letters of the Commissioner of Internal Revenue. On objection, they were excluded, and in my opinion, properly, when offered by the Commissioner. I think that the letters of the Commissioner and the reports of his agents, if relevant, should be admissible, however, when offered by the taxpayer.

The Board has power to issue subpoenas.[17] Unfortunately, it has no power to punish for disobedience, and there is some question whether or not the production of testimony before the Board can be enforced, even by the Courts. This question has been raised squarely by the Commissioner of Internal Revenue himself.[18]

The Commissioner denied the jurisdiction of the Board to review and determine cases under Section 210 of the Revenue Act of 1917 and Sections 327 and 328 of the Revenue Act of 1918. These sections provide for relief in certain abnormal cases, by permitting the tax to be determined by reference to the taxes of other concerns, similarly circumstanced. The Board decided it had jurisdiction of these so-called "special assessment" cases.[19] The Commissioner refused to obey a subpoena requiring him to produce data concerning other taxpayers which it was desired to use in evidence as comparatives in a case before the Board which was to be decided under Section 328 of the Revenue Act of 1918. Subpoenas had been requested by the taxpayer and issued by the Board. The Commissioner took the position that other sections of the law forbade him giving this information. A case has been brought in the Supreme Court of the District of Columbia to compel the Commissioner to produce records, and that court ordered the Commissioner to produce the evidence. The case is now on appeal in the Court of Appeals of the District of Columbia.[20]

I have stressed the question of evidence because of its great importance in the trial of Board cases and because more cases have been lost for failure of evidence than for any other reason.

Congress, in creating the Board, did not take away the power of the Commissioner to make summary assessments.[21] If the Commissioner thinks the tax is in jeopardy, he may make an immediate assessment. The taxpayer, in order to have a hearing before the Board, must then file a bond to secure payment of the tax. Theoretically, this may be sound and equitable. Practically, it still leaves great power in the employees of the Bureau. One great difficulty in the jeopardy assessment is that sometimes there is very little attempt to ascertain the true facts and to make the assessment accordingly. The only consideration in some cases seems to be to make an assessment sufficiently large to cover all possible developments. Assessments of hundreds of thousands and millions of dollars have been made, when, perhaps, no tax or a very little tax could possibly be due. Sometimes the assessments are made upon gross income with no regard for deductions and no attempt to arrive at a fair net income. When this is done, it is an unusual taxpayer who can give a bond to prevent distraint on his property pending determination of the tax. Occasionally, such assessments are made because an agent may feel offended; sometimes, because he thinks he has not been given sufficient information by the taxpayer. In such cases, the agent recommends an immediate jeopardy assessment, and forces the taxpayer to prove it erroneous. These

17. Revenue Act of 1924, Sec. 900 (i); Revenue Act of 1926, Sec. 908.

18. *Oesterlein Machine Co. v. David H. Blair*, Supreme Court, District of Columbia, now pending on appeal to the Court of Appeals of the District of Columbia.

19. *Appeal of Oesterlein Machine Company*, 1 B. T. A. 150; *Appeal of Brownsville & Matamoras Bridge Co.*, 1 B. T. A. 320; *Appeal of Whitney-Roth Shoe Co.*, 1 B. T. A. 453; *Appeal of Guttermon Straus Co.*, 1 B. T. A. 243; *Appeal of H. T. Cushman Mfg. Co.*, 2 B. T. A. 29; *Appeal of Davis & Andrews Co.*, 2 B. T. A. 398. It is apparent, of course, that difficult questions of proof are present in "special assessment" cases.

20. See note 18.

21. Revenue Act of 1924, Sec. 279, 312.

are known as "smoke out" assessments. The effect of a summary assessment is to preclude an appeal to the Board unless the taxpayer, within ten days, can arrange for an acceptable bond in excess of the amount the Commissioner has assessed. It is apparent that such power may be equivalent to vesting in the Commissioner authority to say whether or not an appeal shall be taken.[22]

The Revenue Act of 1926 did not give relief in respect of the Commissioner's power of assessment. In fact, by Section 280, it extended power to the Commissioner to make assessment to transferees of taxpayers, including heirs, legatees, devisees and distributees. It does seem that this power of the Commissioner to make assessments is unduly great, and there is serious danger that it will cause great hardships. It would have been sufficient protection to the Government in case of transferred assets to have made an extension of the statute of limitations, as provided in Section 280, and required the Commissioner to proceed in court rather than give him power to proceed arbitrarily as he may do now.

I believe that legally the burden of proving liability for additional taxes should be upon the Commissioner of Internal Revenue. The law provides that the taxpayer make a return of his net income under oath. There are penalties for false oaths and false returns, and for failure to file a return. If the Commissioner is about to impose an additional tax, there should be a foundation for it, and the burden of showing the foundation should be on the Commissioner. The practice is for the Commissioner to propose an additional tax, and whether assessed or not, to say, in effect, to the taxpayer: "The burden of proof is on you to show that the proposed additional tax is wrong." Possibly the worst form in which this appears is when a penalty and a finding of fraud are proposed in addition to the deficiency. In such a case, the citizen is called upon to prove his innocence. He is not given the facts nor foundation as to the basis of the fraud charge. He is told that this is confidential. The taxpayer must ascertain as best he can the probable basis and then attempt to prove it is not true. If he cannot find any basis for the charge, he must be prepared to prove the truth of every item of income, credit and deduction both on his books and on his return—an almost impossible task.

It would seem that before the Commissioner is permitted to make summary and jeopardy assessments, he should be required to set out the basis for his belief that collection of the tax is in jeopardy, and his action should be subject to some review before he is permitted to take the drastic steps he proposes. No public officer should have the power to act arbitrarily. Practically, he does have the power. Some further curb on jeopardy assessments is needed. Possibly the power to review the Commissioner's proposed summary action might, with advantage be conferred on the Board of Tax Appeals.

Congress has provided a certain period of limitations within which assessments must be made in the absence of waivers.[23] The Commissioner is able, as a practical matter, to defeat at will the limitation period provided by Congress, simply by making a summary assessment, which may involve nothing in the way of a bona fide attempt to determine the tax. It is contemplated, of course, that the Commissioner make the assessment within the statutory period, but an assessment, like a judgment, should presuppose some attempt to arrive at a fair determination of the additional tax.

The Board of Tax Appeals does not have direct jurisdiction of refunds.[24] Jurisdiction over refunds might well be given to the Board, although the necessity for such jurisdiction is not so pressing, for the primary purpose of the Board is to protect the taxpayer from the necessity of paying additional taxes prior to a hearing on the merits before an impartial tribunal.[25] If he has already paid the money, he has his remedy in the courts. Though it might increase the number of cases, I see no particular harm in giving the taxpayer an election to present his refund claim to the Board of Tax Appeals or to sue for the refund in court.[26] This might be desirable, particularly because the Commissioner of Internal Revenue has provided no adequate opportunity for hearings on refund claims. The taxpayer has no right of review by an appellate body within the Bureau itself on refunds. It is true that refund claims for more than certain amounts are reviewed as a matter of practice in the Bureau itself, but this is merely a check upon the auditor. Most taxpayers have been advised in the past, by officers of the Internal Revenue Bureau, to "Pay the tax and file a claim for refund." Even when the same points and questions are involved, the taxpayer has a far more difficult task to get his money back than he would have to successfully contest his liability to pay.

The attitude of the Internal Revenue Bureau toward the Board of Tax Appeals has been interesting. Prior to the creation of the Board, as said before, through rights of appeal of one kind and another, the Bureau itself attempted to correct and did correct many errors of the Revenue agents and auditors. Today there is no right of appeal within the Bureau. The result is that the examining officer's reports are more likely to go through, and the employes of the Bureau take the position, "You can take your case to the Board of Tax Appeals." This has not helped the great question of tax adjustment. It has simply transferred the responsibility from the Bureau to the Board of Tax Appeals. It has caused the taxpayer additional trouble and expense and gives the Board of Tax Appeals unnecessary labor. For a time after the Board began to hand down opinions, the Bureau of Internal Revenue seemed a little distrustful of the rulings of the

22. "Jeopardy assessments," so-called, and other summary assessments, have been made while an appeal was pending before the Board. If the taxpayer pays the assessment, the case becomes one of a refund, over which the Board has no jurisdiction, and will be dismissed on the Solicitor's motion. *Appeal of Northwestern Mutual Life Ins. Co.*, 1 B. T. A. 767.

23. See Revenue Act of 1924, Secs. 277, 278, which provide the limitations applicable to the usual case. Revenue Act of 1926, Secs. 277, 278, 1109.

24. *Appeal of Everett Knitting Works*, 1 B. T. A. 5; *Appeal of J. Victor Barron*, 1 B. T. A. 15; *Appeal of Terminal Mine Co.*, 1 B. T. A. 697; *Appeal of Alfred B. Day*, 1 B. T. A. 15; *Appeal of Milwaukee Gas Specialty Co.*, 1 B. T. A. 22; *Appeal of Joseph Garneau Co.*, 1 B. T. A. 73. The Board may determine that the asserted deficiency is not only due but may find facts that entitle the taxpayer to a refund. In such cases, however, the Commissioner is not bound to regard the refund as adjudicated by the Board. *Appeal of Est. of Mary E. Jackman*, 2 B. T. A. 515.

25. "The Board was created to give the taxpayer an open and neutral consideration of liability for a deficiency before he is required to pay. The harsh rule of payment first and litigation afterwards was sought to be modified." *Appeal of Everett Knitting Works*, 1 B. T. A. 5.

26. This presupposes, of course, the rejection of the claim by the Commissioner.

Board. It withheld announcement of its acquiescence or non-acquiescence for an unduly long time. There has been, however, a distinct improvement in this respect. Except in comparatively few cases, the Commissioner is now prompt in announcing either that he will acquiesce in a given Board decision or that he will contest the case in the courts.

One argument which was advanced against correction of errors by appeal within the Bureau is that the stress of work in the Bureau is too great and that the Bureau hasn't time to correct its own errors. I question this policy. It is likely that time is saved in the long run by an attempt to decide the matter correctly in the first instance. Nothing is saved by passing the case from one body to another, and much is wasted. The Bureau would not usually correct an error after the sixty-day letter. It should be willing to correct its errors both before and after the issuance of such letters. As before stated, some steps have been taken in this respect. I understand that a hearing will now be granted in cases where so-called "jeopardy" sixty-day letters have been mailed. In such cases, the taxpayer had not had an opportunity for hearing. Also, the trial division of the General Counsel's Office is doing some commendable work in correcting the errors of the Bureau. If the courts sustain the Board of Tax Appeals in the matter of production of the Commissioner's records, I hope the Commissioner will meet the issue fairly and make it as easy as possible for the Board to arrive at a fair answer in special assessment cases. Such cases are difficult at best.

I have already spoken of the personnel of the Board. It is an unusually good personnel for a public body. I think appointments were made with a minimum regard to politics. I do not think there is any doubt that the personnel was largely selected in the first instance by the Treasury Department and recommended to the President, who made the appointments. The members, however, have shown a commendable spirit of independence from the Treasury. I think the Treasury Department has attempted to select men because of fitness, but on the other hand, there is danger in this method of recommendation. The Treasury Department is a party to the litigation in every case before the Board, and the Board must remain absolutely independent of that department. There may be a danger in this method of recommendation; the Board must remain absolutely independent of the Treasury Department.

The Board of Tax Appeals, though still young, has justified its existence. It is a fair, impartial, able and independent tribunal, and has protected from arbitrary and summary action by the Bureau of Internal Revenue. There was great need for such a body. I think the prevailing sentiment of the country favors the Board, and that if any change is made in its jurisdiction or powers, the change will be by way of enlargement rather than curtailment.

RECENT PROGRESS IN LEGAL EDUCATION

By JOHN B. SANBORN
Secretary of the Section of Legal Education

ALFRED Z. REED, Staff Member of the Carnegie Foundation for the Advancement of Teaching, contributes to the Biennial Survey of Education in the United States, 1922-24, issued by the Bureau of Education, a brief review of "Recent Progress in Legal Education." "Recent" is defined by Mr. Reed as the period since 1910.

He starts with an analysis of the situation in that year, at which time he finds the organization of the legal profession defective, the law schools divided among themselves, the Bar Admission requirements inadequate, and the law school requirements diversified. He then comes to the present year and notes advance along all of these lines. He finds the improvement especially marked in the field of professional organization. The American Bar Association has increased its membership more than sixfold and the proportion of its membership to the total number of lawyers from 3% to 17%. One may perhaps question the significance of these percentages, as the figures for the total lawyers in this country must include a large number who are technically lawyers, but who have long since abandoned any idea of maintaining an office for the practice of law. He also notes three items as of more importance than mere size. The first is the establishment of a periodical in 1915 which has developed into what he characterizes as the "ably edited" Journal of the American Bar Association. The second is the establishment of the Conference of Bar Association delegates, which he calls "the beginnings of co-operation with State and local Bar Associations." The third is the reorganization of the sections in 1919, particularly, of course, as far as progress in Legal Education is concerned, of the Section of Legal Education and Admissions to the Bar. In this same connection, he refers to the growth and development of the Association of American Law Schools, which has increased both in total number of member schools and in the percentage of members to the schools of this country.

While he would not say, of course, that the present law schools of the country are united in their aims and methods, he does note a considerably increased agreement, particularly in the adoption of the case system as a standard for the teaching of law.

In the matter of Bar Admission requirements, while he finds that no state has fully adopted the recommendations of the American Bar Association, and that only four states (Kansas, Illinois, West Virginia and Ohio) have announced a requirement of the equivalent of two years of college before beginning the study of law, yet he finds considerable reason for encouragement in the progress which has been made. Montana should have been included among the states requiring two years of college work as preparatory to the study of law, and Wis-

consin has entered this class since the pamphlet was published.

In law school requirements, he sees much greater progress. The number of law schools giving a course of less than three academic years has been reduced from 40 to 8. The schools announcing two or more years of college as an entrance requirement have increased from 10 to 81. The schools requiring two years of college plus three years in the law school have increased from 8 to 65. On the other hand, he, of course, notes the increase of the part time and mixed time schools over the full time schools, both in number and proportion.

Throughout his discussion of the changes in Legal Education, Mr. Reed makes comparison with the situation in medicine. However, he recognizes and points out certain fundamental differences between the two professions. Probably he also gives too favorable an impression of the situation in medical education, in that his figures deal only with those who are preparing to practice as regular practitioners. While in this particular field, the menace of low standard preparation has largely vanished, various new cults are rising and obtaining recognition, which although not claiming to practice medicine in the orthodox sense, do claim to be able to heal even more effectively than the regular practitioner, all human ills. If these cults are taken into account, the comparison between the two professions is not as unfavorable to the lawyers as Mr. Reed's figures indicate.

In addition to the sections devoted to the past (1910) and the present (1926), Mr. Reed also has a section devoted to the future. He there refers to a theory advanced by him in the Bulletin of the Carnegie Foundation on "Training for the Public Profession of the Law," published in 1921. Briefly stated, that theory is as follows: The legal profession is not only a private profession whose members give advice to and try the cases of the various clients who consult the members of the Bar, but as indicated in the title of the Bulletin, it is a public profession exercising a very strong political influence in this country. Standards for admission to the bar must take into consideration this aspect of the profession in that certain standards which might be justified merely as affecting the professional efficiency of the lawyer, would not be justified because of their undemocratic effect upon the membership of this public profession.

So far Mr. Reed is in agreement with the general views of the Bar, and specifically, as he points out, with the report of the Committee of the Section of Legal Education and Admissions to the Bar, of which Elihu Root was Chairman. The important application of this idea, of course, is in regard to the part time law school. Both Mr. Reed and the report of Mr. Root's Committee, afterward adopted by the American Bar Association, recognize that the suppression of part time schools and the refusal to admit to the legal profession those who could not afford to take their training for the bar in full time schools, would be an evil. At this point, however, the agreement ceases. The Root Committee believed that part time schools could operate under the same standards as full time schools, so that those who receive their training in part time schools could come to the bar prepared to take their places alongside of those trained in full time schools. Mr. Reed does not believe this. In the Bulletin of the Carnegie Foundation, he suggested that the lawyers of this country were mistaken in urging a unified bar, and that the future development of the legal profession would probably result in a division of function between the graduates of the high standard full time schools and the lower standard part time schools. Just how and where the functions of the two bars would divide was not clearly stated in the Bulletin, and this point is not developed in the present pamphlet. Certainly Mr. Reed's suggestion of a diversified bar has not received the approval of either practitioners or those connected with law schools, either full time or part time. However, it colors his discussion of recent progress in Legal Education as he considers that progress directed toward unified methods of law schools and unified standards of admission to the Bar is progress toward a wrong goal. In spite of this his discussion of the subject is a most stimulating one and should be read by every lawyer interested in the questions of legal education and proper standards of admission to the bar which should mean every member of the American Bar Association.

Madison, Wis., June 24.

The Selden Society in 1925

Following are certain interesting extracts from the annual Report for 1925 of the Selden Society, of which Viscount Cave, who addressed the American Bar Association at the St. Louis meeting, is president:

1. The number of members for 1925 was 424. Notwithstanding losses by death and resignation the number of members now is 468.

2. The publication for the year 1925 was to have been Volume IX. of the Year Books of Edward II, edited by Mr. G. J. Turner, being Volume 42 of the Society's publications. The Council regret that the Editor was unable to complete the volume in time to issue it in 1925. It is, however, nearly completed, and will be issued shortly.

3. The Council have in the Press a volume of Year Books of Edward II, which will be Volume XIV, part 2, of the Year Book Series by Mr. W. C. Bolland. This will be the volume for the year. The Council also have in the Press the *Liber Pauperum* of Vacarius edited by Professor de Zulueta.

4. Provisional arrangements have been made for further publications, viz. a volume of "Select Ecclesiastical Pleas," by Professor Hazeltine and Mr. Hilary Jenkinson; a volume of "Select Entries from the Exchequer of Pleas," by Mr. Hilary Jenkinson; a volume of "Select Cases on the Law Merchant," Volume II, by Mrs. E. E. Watkins; a volume of "Year Books of Edward IV," by Mr. W. C. Bolland; and another such volume by Miss N. Neilson.

5. The Council are proposing to issue as an extra volume a new edition of Selden's "Table Talk," based on a specially good MS. belonging to the Honourable Society of Lincoln's Inn.

6. The period of office of Professor Courtney S. Kenny having expired, the Council have nominated in his place Professor W. S. Holdsworth, K.C., who has kindly consented to accept the office.

CURRENT LEGISLATION

Recent Legislation Affecting Carriers by Motor

By STERLING PIERSON

THE advent of the motor bus as a rival of transportation by rail has created a new problem for legislatures. The cost of constructing and equipping a railroad for operation has in the past tended to discourage the building of parallel rail routes except where the need for additional service has been fairly apparent. The comparatively low price of the bus, as well as the cost of its upkeep and the taxes paid for the privilege of its operation have made it possible for many financially irresponsible individuals to compete with one another and with railroads in the transportation of passengers and freight.[1] The resulting competition, which has made serious inroads upon short-haul passenger and freight traffic of railroads, has not been entirely satisfactory from an economic standpoint, and the legislatures have deemed it necessary to limit the right of new companies to engage in this type of public service.[2] The means employed for the limiting of new enterprises has usually been the certificate of public convenience and necessity.

The principal purpose of the earlier legislation providing for such certificates was the protection of the interests of carriers already in operation. In New York, for example, a statute provided that a bus line, stage route, motor vehicle or a vehicle carrying passengers in competition with another common carrier should be deemed a "common carrier" and required that a certificate of public convenience and necessity be obtained from the Public Service Commission before operating such a service.[3] Iowa authorized cities and towns to prohibit jitney busses or other motor vehicles operating upon the streets and engaged in carrying passengers for hire "on a plan similar to that followed by street railroad companies" from operating on any part of a street or avenue upon which a street car line was operated pursuant to a city franchise.[4] New Jersey provided that a jitney route which paralleled upon the same street the line of any street railway should be deemed a public utility subject to supervision and regulation by the Board of Public Utility Commissioners.[5]

When it appeared that motor transportation was something more than a temporary expedient and that the carriers by motor were in business to stay, the legislatures began to subject them to regulation similar to that which had existed for a long time with respect to carriers by rail. A California statute applicable to any transportation company carrying persons or property for compensation "over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town," required every such company, whether or not competing with an existing carrier, to obtain a certificate of convenience and necessity from the Railroad Commission before engaging in business.[6] The Commission was authorized to fix the rates of such companies, regulate their accounts and require the periodical filing of financial reports, and also to supervise the issuance of securities by carriers subject to the act. Washington in 1921 adopted a similar statute providing for the regulation of motor transportation companies.[7] This law required such companies to obtain a certificate of public convenience and necessity as a condition precedent to entering upon competition with an existing carrier, and provided that the Commission should grant such a certificate only when it appeared that the established service was not providing adequate transportation. Before receiving a certificate of convenience and necessity the new company was to file with the Commission a proper liability and property damage insurance policy. In Virginia an application for a certificate of convenience and necessity was not to be granted except where the public convenience was not being reasonably well provided for by the existing service.[8] The existence of one service was not to preclude the Commission from granting a certificate to a new applicant, but in such a case the number of vehicles to be operated by the new company might be limited.

A Michigan act forbade motor vehicle carriers to hold themselves out as public utilities without first obtaining a certificate of convenience and necessity which might be withheld wherever it appeared that the applicant would not be able to furnish adequate, safe or convenient service.[9] In Tennessee certificates of convenience and necessity were required of all public utilities seeking to compete with an established business, and it was provided that such certificates should not be granted unless the existing service was inadequate or the company maintaining that service neglected or refused to make additions to and betterments of its equipment to meet the public need.[10]

In 1925 at least eight states either provided for the first time for the regulation of motor carriers or further extended the application of their existing statutes.[11] In Indiana no certificate of convenience and necessity is to be issued until after a public

1. "Within the last decade, however, motor vehicles have in various ways entered the field of common carriers, in some cases to the great financial detriment of the long established transportation systems. They have compelled recognition as an important factor in transportation." Maine Motor Vehicles v. P. U. Commission (1925 Sup. Ct. Maine) 130 Atl. 866.

2. "Motor transport has also made serious inroads into short-haul passenger and freight traffic, and as hard surface roads are extended this will measurably increase." Carl R. Gray, President of the Union Pacific System, in address entitled "Railroad Health a National Asset." Proceedings of the Nineteenth Annual Meeting of the Association of Life Insurance Presidents at page 55.

3. N. Y., Laws (1913) c. 495.

4. Iowa, Acts (1921) c. 115.

5. N. J., Laws (1921) c. 149.

6. Cal., Codes and Gen. Laws (Deering Cons. Supp. 1917-19) Act 2331d.

7. Wash., Laws (1921) c. 59.

8. Va., Gen. Laws (1923) c. 90A.

9. Mich., Acts (1923) No. 209.

10. Tenn., Acts (1923) c. 87.

11. 1926 Report of the Committee on Noteworthy Changes in Statute Law, page 17.

hearing and a consideration by the Public Service Commission of the service rendered by existing motor vehicle common carriers in the territory in which the applicant proposes to operate.[12] Such a certificate may be sold, assigned, leased, bequeathed or transferred with the approval of the Commission. In order that there may be no doubt as to the legislature's intention to permit a private party injured by violation of the statute to enforce its provisions, it was expressly stated that "All legal and equitable remedies of a civil nature to enforce the provisions of this act . . . may be used by said commission or any person or corporation having a special interest in such enforcement." The Minnesota statute provides that operators of motor vehicles engaged in public service may be required by the Railroad Commission to install proper safety and automatic speed checking devices in their equipment, and to construct suitable depots or waiting rooms for passengers at any point on the highway traversed by such carriers.[13] The Commission, in passing upon applications for certificates of cenvenience and necessity, is to give reasonable consideration to the existing service operated by any railroad, the effect the proposed service would have upon other forms of transportation service which are essential and indispensable to the communities to be affected by the proposed service, and the effect which the authorization of the new route would have upon the excess cost of maintaining the highways over which the route is to run. A carrier which has obtained a certificate of convenience and necessity may not thereafter discontinue its service without the consent and approval of the commission. Where a petition for a certificate has been denied in whole or in part, no new application by the same applicant is to be entertained by the commission within one year from the date of the order entered in connection with the first application unless it appears that there has been a material change in the transportation needs of the communities which would be affected by the proposed service. Minnesota[14] and Oregon[15] recognize the difficulties which the commerce clause raises in connection with attempted regulation of motor vehicles in interstate commerce, and provide that their respective statutes shall not apply or be construed to apply to interstate commerce, except so far as permitted under the provisions of the Constitution and Acts of Congress. The South Dakota law vests in the Board of Railroad Commissioners power to regulate the properties, facilities, operations, accounts, service, practices, affairs and safety of operations of all common motor carriers, and provides for the usual certificate of convenience and necessity.[16] A provision which is interesting as indicating the tendency to protect the established carriers is that declaring that "If a conflict should arise between carriers desiring to operate over the same route, where public convenience and necessity is shown, due consideration shall be given by the Board to the length of time that any applicant has been in business, the kind and character of service rendered and the amount of capital invested." The South Carolina act is one of the most complicated thus far enacted. It provides for four separate classes of certificates, varying with the type of business and the method of solicitation.[17]

The exemptions provided for by the various statutes furnish interesting illustrations of the contrasting economic interests of different communities. Taxicabs, hotel and sightseeing buses are quite generally exempted. The Virginia law does not apply to motor vehicles engaged exclusively in "transporting persons to or from schools, Sunday schools, church or religious services, or to or from picnics upon special pre-arranged excursions." South Carolina has a similar provision. Minnesota exempts motor vehicles used by any transportation company exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market. In South Carolina lumber dealers engaged in transporting lumber and logs from the forests to the shipping point are not subject to regulation.

It has sometimes been said that a certificate of public convenience and necessity is really nothing more than a motor bus license, but a study of the decisions with respect to the rights of the holders of such certificates indicates that this point of view is not wholly accurate, as the certificate holder has rights not accorded a mere licensee. It has generally been held that the administrative body issuing such certificates may, upon the complaint of the holder of a certificate, enjoin the operation of routes by carriers not possessing a certificate.[18] In the absence of a specific statutory authorization, however, there has been considerable doubt as to the right of a certificate holder to enjoin his competitors from operating without a certificate. The general trend of authority has been toward granting injunctive relief in such cases, although there has been no unanimity of opinion as to the reasons for doing so.[19] In several New York cases the plaintiffs based their petitions upon the principle that the operation of bus routes by competitors having no certificates amounted to illegal and unfair competition.[20] In a Washington case in which one bus operator sued another to enjoin him from further operation in violation of the Washington statute and to recover damages incurred as a result of past operation, the court gave judgment for the plaintiff on the ground that the maintenance of a bus line in violation of the statute regulating that business amounted to maintaining a nuisance per se.[21] It seems that in Washington mere competition will be enjoined even though the competitor makes no charge for his services, the theory being that the detriment to the existing carrier's business creates a cause of action, regardless of the fact that the competitor makes no profit.[22]

These cases seem to indicate that the courts are considering such certificates more as franchise than as mere licenses. This thought was expressed in a decision of the Supreme Court of Appeals of West Virginia in a case involving an application by a certificate holder for an injunction restraining the illegal operation of competing bus line in which the court said, referring to the certificate of convenience

12. Ind., Acts (1925) p. 138.
13. Minn., Laws (1925) c. 185.
14. Id.
15. Ore., Acts (1925) c. 380.
16. S. D., Laws (1925) c. 224.
17. S. C., Acts (1925) No. 170.
18. Public Service Commission v. Hurtgan (1915) 91 Misc. 432.
19. United Traction Co. v. Smith (1921) 115 Misc. 73; Pocahontas Power Co. v. Calloway (Sup. Ct. of Appls. W. Va. 1925) 130 S. E. 468; Princeton Power Co. v. Calloway (Sup. Ct. of Appls. W. Va. 1925) 128 S. E. 89; Public Utilities Commission v. Garviloch (Utah 1919) 181 Pac. 272.
20. See, *supra*, footnote 19; Niagara Gorge R. Co. v. Gaiser (1919) 109 Mis. 38.
21. Northern Pacific Ry. v. Schoenfeldt (1923) 213 Pac. 26.
22. Davis & Banker v Nickell (Wash. 1923) 218 Pac. 198.

and necessity, "The right of a licensee operating under such a permit is in the nature of a franchise from the state, and therefore an object of injunctive protection. Courts of equity have jurisdiction by injunction to protect a franchise from unlawful invasion or disturbance, and will exercise such jurisdiction to secure the enjoyment of a franchise privilege or to protect against an invasion of such franchise." [23]

Another problem which has caused the courts considerable difficulty is the determination of the question whether carriers operating over a regular route or between fixed termini pursuant to contracts with specified individuals or corporations are common carriers.[24] The legislature of California sought to eliminate the doubt existing as to this point by enlarging the definition of the term "transportation company" to include a carrier operating under a private contract or contracts and to extend the regulative control of the Railroad Commission to such a carrier.[25] A recent decision of the Supreme Court of the United States held that the amendment was unconstitutional because it in effect converted a private carrier into a common carrier against his will, thereby violating the due process clause of the Fourteenth Amendment.[26] This makes it possible for carriers to escape the onerous duties and obligations placed upon carriers professing public service by resorting to the device of making private contracts in an unlimited number without professing to be engaged in business as a public utility.

Anyone reading the provision of the statutes referred to above must be impressed with the indefiniteness of the tests laid down by the legislators for the guidance of administrative bodies determining when the public convenience and necessity require the establishing of a new service. This indefiniteness created the likelihood that disappointed applicants would seek a judicial review of the findings of the administrative authorities. It is interesting to note a few of the cases in which the courts have reviewed the circumstances alleged to warrant the granting of a certificate of convenience and necessity. One court refused to reverse the decision of a Public Utilities Commission denying a certificate to an applicant proposing to operate along a route already served by two other motor bus lines, an interurban railroad, and by two steam railroads, calling attention to the fact that authorization of the new service might result in the discontinuance of the railroad service and the further crippling of the already unprofitable service of the interurban street railway.[27] Even though all the testimony given at a hearing upon an application for a certificate is to the effect that additional service is required, a commission may draw its own conclusions and form its own opinions as to the existence or non-existence of the public convenience and necessity.[28] In one Illinois case the court refused to sanction the contention that inasmuch as the applicant would charge a smaller fare than a street railway line already in operation in the same territory, this indicated that the public convenience and necessity demanded the granting of the application.[29] In *Rapid Ry v. Michigan Public Utilities Comm.*, the court was called upon to review the Commission's action in granting a certificate to a motor carrier to operate over a route almost identical with that traveled by an existing street railway line.[30] It was held that the discretion of the Commission should be limited to determining whether public convenience and necessity existed with respect to motor transportation, and the fact of the existence of an electric car line should not have influenced the Commission's judgment. In last analysis the courts and administrative bodies must be governed by the peculiar circumstances of each case rather than by general principles or rules of law.

The two recent decisions of the Supreme Court declaring that motor carriers engaged in interstate commerce may not be required to obtain certificates of convenience and necessity have left such carriers in the happy position of being able to compete with carriers by rail without being subject to the supervision and regulation existing with respect to railroads.[31] If the economic policy behind these statutes proves sound it may be that Congress eventually will be called upon to authorize the Interstate Commerce Commission to supervise the new type of carrier, in order to protect the interests of interstate rail carriers.

23. Carson v. Woodram (Sup. Ct. W. Va.) 1925) 130 S. E. 512.
24. See Hissem v. Goran (Ohio 1925) 146 N. E. 808; Red Ball Transit Co. v. Marshall (D. Ct. S. D. Ohio 1925) 8 F. (2d) 635.
25. Cal., Acts (1919) c. 280.
26. Frost v. Railroad Commission of the State of California, decided June 7, 1926, not yet reported.
27. Cincinnati Traction Co. v. Public Utilities Commission (Ohio 1925) 148 N. E. 921.
28. Eager v. Public Utilities Commission (Ohio 1925) 149 N. E. 865.
29. West Suburban Transp. Co. v. Chicago & W. T. Ry. (Ill. 1923) 140 N. E. 56.
30. (Mich. 1923) 196 N. W. 518.
31. Buck v. Kuykendall (1925) 267 U. S. 302, passing upon Washington statute; Bush Co. v. Maloy (1925) 267 U. S. 317, passing upon the Maryland statute.

Jefferson on Draftsmanship

"Feb. 6. In the execution of my part I thought it material not to vary the diction of the ancient statutes by modernizing it, nor to give rise to new questions by new expressions. The text of these statutes had been so fully explained and defined by numerous adjudications, as scarcely even now to produce a question in our courts. I thought it would be useful also, in all new draughts, to reform the style of the later British statutes, and of our own acts of assembly, which from their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by *saids* and *aforesaids*, or by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves."—The Works of Thomas Jefferson, First Volume, p. *69*.

Annual Convention of Women Lawyers' Association

On September 1, 1926, there will be held in New York City the annual convention of the Women Lawyers' Association. At that time the name of the organization is to be changed to National Women Lawyers' Association, and a more definite organization is contemplated of the State Local Councils.

The association was organized in 1899 and now has members in forty-two states, publishes its magazine, and follows a study program between annual meetings, with discussion of topics of national interest.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE *Theory of Justice*, by Rudolf Stammler. Translated by Isaac Husik. With a Translator's Introduction, and Appendices by Francois Geny and John C. H. Wu. Modern Legal Philosophy Series. New York: The Macmillan Co., 1925, Pp. XLI, 316, $6—. The appearance in this volume of the translation of Stammler's "Die Lehre von dem Richtigen Rechte," Berlin, 1902, makes available for English readers an earlier statement of the author's famous theory of justice, which is perhaps the most noteworthy contribution to the subject made in this century. In his "Fundamental Tendencies in Modern Jurisprudence"[1] is to be found a later formulation of the same theory. His "Lehrbuch der Rechtsphilosophie" published in 1922, gives a lucid and succinct account of his matured doctrine. This volume was written for the use of students and contains full citations of the authorities. Unfortunately it has not yet been translated into English.

In order to understand the Neo-Kantian juristic idealism of Rudolf Stammler one must go back to Socrates. The Berlin professor may properly be considered the third in the great triumvirate: Socrates—Kant—Stammler. In his discussion of the conception underlying all the processes of thought, Socrates said[2]: "You know that when the geometricians talk about circles, they are not thinking about the figures which they draw but about the originals, not about any particular circle but about the absolute circle which one can see only with the eye of thought." This something, visible only to the eye of thought, is the "idea." It is what the modern philosophers would call a mathematical absolute, which every conceivable intelligence, eveywhere, at all times, must think, if one thinks about the subject at all. This conception of the idea as formulated by Socrates was translated by Cicero with the word *forma*. The mediaevalists used as its equivalent the term *essens*, the something that really *is*. Stammler says that the "Idee der Gerechtigkeit," "the idea of justice," is one of the conceptions of *unconditioned universal validity* with which the philosophy of law deals.[3]

The idea of justice is then the juristic absolute, analogous to the idea of circle in mathematics. Any actual law is but an approximation to the idea of justice, just as any circle drawn by us is but an approximation to the ideal circle which exists, as Plato says, only in the mind of the God. The indestructible foundations laid down by the Greeks for mathematics were available also for the science of ethics, according to Stammler.[4] He quotes with approval the proposition presented by Socrates "that one can *prove* whether the content of an aspiration is *right* or not." The science of ethics, and of law as well, is therefore based upon a theory as indisputable as is that of the science of mathematics.

The second one of this great triumvirate—Kant—demanded a clear understanding of the conditions necessary to attain *universally valid* principles. And although "Kant did not carry through consistently in matters of *law and justice* the remarkable work he accomplished for natural science and ethics,"[5] nevertheless as a juristic idealist he further developed the conception of the "idea" as laid down by Socrates, and in Stammler we find it brought to its perfect form.

Kant has defined justice as "the sum of the circumstances under which the will of the one may be reconciled with the will of the other in accordance with a universal[6] rule of freedom." According to Stammler[7] the critical theory of law distinguishes: (1) between *form* and *matter;* (2) between "notion" and "idea." *Form* is Stammler's juristic absolute. He defines it as a "uniformly determining method of ordering," by which we set in order our intellectual possessions, which constitute the *matter* of our conceptions. This "uniform method of ordering" is for juristic thinking the analogue of the Socratic mathematical conception of circle. It is the ideal to which we must ever approximate.

The pure forms of legal speculation are the "notion of law" and the "idea of justice."[8] The notion of law is the mental representation of the common element in individual isolated objects. Law is thus distinguished from other fields of knowledge; e. g., ethics, in that it has in it an element common to every legal rule but distinct from the element common to every ethical rule.

As defined by Stammler, Justice[9] is the "conception of perfect harmony in the infinite whole of all conceivable will contents. The content of a particular law would then be *fundamentally right*, if it fitted harmoniously, as far as one can see into that totality of aims." This conception of perfect harmony in the ideal of justice is common to Kant and to Stammler, but Stammler looks at the ideal as a social ideal, while Kant never got beyond an individualistic conception.[10] Stammler's ideal of collective life is however far beyond that of

1. See 21 Mich. Law Review, p. 623 ff.
2. Plato's Republic VI, 510. Cf. Ferrier's "Lectures on Greek Philosophy", p. 316.
3. Cf. Lehrbuch der Rechtsphilosophie, S. 1.
4. Cf. 21, Mich. Law Rev. 879.
5. Ibid. p. 880.
6. Metaphysische Anfangsgruende der Rechtslehre, Ein. p. XXXIII. The original uses "allgemein" which certainly should be here translated as universal.
7. 21 Mich. Law Rev. pp. 881, 882.
8. Ibid. p. 884, Cf. p. 640.
9. Ibid. p. 887.
10. See Pound, The Scope and Purpose of Sociological Jurisprudence, in 25 Harv. Law Rev. 143.

his predecessors. Jhering had indeed gone beyond the individualistic conception of Bentham and the early utilitarians. Law was for Jhering[11] "a social force created by society, and to be used for the benefit of the individual interest only in so far as the interest of the individual coincides with the interest of society." But Jhering's "purpose" was no more than the *causa finalis* of Aristotle.[12] It was at best a generality, while Stammler's "Idee der Gerechtigkeit" is the *causa formalis vel essentialis*, a true universal.

Stammler further defines justice[13] as the "directing of a particular legal volition according to the conception of a perfect community." This legal volition aims at combining the purposes of individuals as reciprocal means for one another. The purpose of one becomes a means of furthering the purpose of another and *vice versa*. This reciprocal combination of purpose is objective in character and as such it is simply an *idea*. It has never been and never will be experienced. It is simply "the pole star on which the mariner fixes his gaze, not to reach it and land there, but to steer his craft by it through weather fair and foul."

This conception is an advance upon the Socratic-Platonic idea in that it is not and cannot be an object of sense.[14] It is a pure form. As such it approaches even more closely to a mathematical absolute than does the Platonic conception. On the other hand the conception of a perfect community gives to this ideal its sociological significance. Kant had balanced individual interests against other individual interests. Stammler is ever emphasizing the need "of adjusting the individual desire to the purpose of the community."[15] Stammler's great contributions here are then: (1) that he has clarified and intensified the conception of the "idea," and (2) that he constantly stresses the fact that his is a social ideal.

In the opening chapter of his Theory of Justice[16] Stammler makes clear the distinctions between his concept of just law and kindred conceptions that are often confused with it. Here is shown to wonderful advantage his skill as an analytic jurist. In distinguishing just law from positive law he says, "Just law does not stand outside of positive law as a kind of norm with non-legal requirements; . . . Just law is positive law whose content has certain objective qualities. It applies to all law past, present and future. It denotes a critical treatment of a historically growing content, in so far as it classifies it systematically as just or unjust."

In his differentiation of just law from ethics[17] he dwells upon the social characteristic of just law. The old distinction between ethics as internal and legality as external, he says, is clear and has long been observed, but this gives us only a suggestion of the difference. The more significant distinction according to Stammler is that "Ethical theory is concerned with the purity of thought, with the perfection of the inner life; just law denotes a content of will which determines in well-founded fashion external behavior. Hence the difference between them lies not in a certain content of this or that act but in the difference of manner in which the desire for justice presents itself. The former seeks to realize the good intention of the individual man; the latter aims to effect justice in the external life of society."[18]

Stammler takes exception to the theories of the old law of nature school[19] in that its exponents "all undertake by their own method of argument to outline an ideal legal code whose content shall be unchangeable and absolutely valid." His purpose on the other hand is to find "a universally valid formal method by means of which the necessarily changing material of empirically conditioned legal rules may be so worked out, judged and determined that it shall have the quality of objective justice."

In distinguishing just law from grace[20] Stammler defines grace as "a special method adopted by legislation to arrive at results that are objectively justified. *Grace is the exercise of just law without legal compulsion upon the basis of ethical duty.*

In the last chapter of this section of the book Stammler distinguishes a number of uncritical conceptions of law from the conception of just law. Of these, the first four; namely, the natural feeling of right, the feeling of right in the national soul, ideas prevalent in a legal community and the morality of the classes, fall short of being just law because each is a generality of more or less comprehensive scope, while just law is an absolute, a conception of "unconditioned universal validity."

It seems plain from Geny's criticism of Stammler, on page 549, that he does not see clearly how Stammler passes from the "idea" of just law through his famous "principles" of just law and then through his "model" of just law to the practice of just law in its specific applications. Possibly the solution of the difficulty is to be found in Stammler's statement[21] "that the concept of *form* can reappear many times in the course of the discussion of the same thing. The general 'notion' of contract of sale is the logical prerequisite of each and every sale, so that, in the latter, one is able to distinguish clearly *form* and *matter*. But the 'notion' contract of sale is subordinate to the general mental representation of contract, and this, like all particular 'legal' representations, is, in the final analysis, subordinate to the conception of law in general. Thus the formal, that is, the logically conditioning elements of a conception, may be subdivided into *limited* forms and *pure* forms. The former are such as are dependent on other higher forms. We have this kind of form whenever a sensibly perceivable object is included in their mental representation. The *pure* forms, on the other hand, are nothing but conceptual methods of ordering. Among them are to be reckoned the conceptions of law and justice."

Just as Stammler passes from "law," which is a pure form, through "contract," a limited form, and then through "contract of sale," again a limited form, to the application in a particular case, which is the "materia"; so in like manner he passes from the "idea of just law," a pure form, through the "principle of just law," a limited form, then through "the model of just law," again a limited form, to the application in a particular case, the "materia."

In passing from the "idea" of justice to its application in a particular case, our first step brings us to Stammler's famous principles of just law. These he says "emanate from the idea of just law, which they are intended to realize and make supreme."[22] These

11. Law as a Means to an End, Ed. Pref. XIX.
12. Analytica Post. L, II, c. X.
13. 21 Mich. Law Rev. p. 889. Cf. also p. 640.
14. Ferrier, op. cit. p. 371.
15. Stammler, Theory of Justice, p. 152; to be cited hereafter as "Justice."
16. "Justice," p. 19.
17. Ibid. p. 41.
18. Ibid. p. 44.
19. Ibid. p. 89.
20. Ibid. p. 111.
21. See 21 Mich. Law Rev. 883.
22. "Justice" p. 211.

principles are not to be gathered from haphazard historical observation, else we may reach such a result as did Ulpian in his *suum cuique tribuere*, which is not a true universal but rather a broad generalization.

In deriving his principles of just law Stammler says, "Every individual living in society must be viewed from two standpoints:" (1) from that "of the individual *qua* individual" or (2) from that of "the community of individuals and their common aims." The first "lays stress upon the *respect* due the individual in his specific right volition, whereas the second insists on the ideal of a social community and mutual *participation*." We thus arrive at the two principles:[23] (1) *The principle of respect*, (2) *The principle of participation*. 'Each of these two presents itself in two aspects requiring distinct treatment. The subdivisions of the principle of respect are, (1) One's will must not be subjected to the arbitrary control of another will. (2) Every legal claim may exist only in the sense that the person obliged can still be a fellow creature. The principle of participation has likewise a double aspect: (1) One legally united to a community may not be arbitrarily excluded therefrom. (2) Every legally conferred power of control can be justified only when the individual subject thereto can yet exist as a fellow creature.

It should be noted that Stammler says of the two so-called "principles" of respect and participation that "their validity is absolutely universal and applicable to all law." "They emanate from the idea of just law which they are intended to realize and make supreme." He thus makes it perfectly plain that they are true "forms" in the technical sense of that term, but, and this is the significant point, they "are dependent on other higher forms; i. e., they are *"limited* forms"[24] which we have "whenever a *sensibly perceivable* object is included in their mental representation."

Stammler tells us that these principles "can not in themselves take up directly and immediately the manifold and concrete legal material and work it up in accordance with their idea." They are only the first "step in our progress from the concept of the social ideal to the historical regulations of law."

The second step in the progress from the idea of justice to its application in the particular case, is presented by Stammler in his discussion of "The Model of Just Law"[25] ("Das Vorbild des Richtigen Rechts"). He defines his model of just law as "a unitary method of subsuming doubtful questions of right conduct under the social ideal and its principles." He says this "model of just law must itself be a universal." It is entirely distinct from the peculiar characteristics of empirical material. It springs from the idea of just law itself and is a connecting link "between the social ideal and its principles on the one hand and the manifold legally ordered life of man on the other."

"The model of just law is the conception of a special community among those who must be controlled and determined according to the principles of just law." We need the conception of "a special community of men fighting for their personal interests, to serve as a basis for the realization of the principles of just law." This special community is a "theoretical means to aid us in subordinating a concrete material to the abstract principle of just law." "The parties disputing must be mentally fashioned into a special community and in defining and adjusting it we must make use of the principles of just law."

As Stammler emphasizes the fact that the universal, "form," is present alike in the "idea," the "principle" and the "model" of just law, and as the "idea" is one of the *pure forms* of juristic thinking, the other two must stand in the relation of *limited* forms to the "idea." In each of the two a "sensibly perceivable object is included in the mental representation." In the "principle" this is the individual and the social group, and within the social group is the "special community" which is the characteristic mark of the "model" of just law. The universal, present in the "idea" of just law, appears also in the "principles" of just law, though as a *limited* and not as a pure form and is present too as a *limited* form in the "model" of just law. We pass from the "idea" of just through the "principles" of just law and then through the "model" of just law to the application of just law, in the practice of just law.

Stammler says "the practice of just law is related to its method as the art of surveying to geometry." We therefore have in the method of just law the juristic absolute, of unconditioned, universal validity, as in geometry we have the mathematical absolute which has a like character.

The most interesting part of Stammler's discussion of the application of just law in practice is perhaps, for the American jurist at least, his chapter on the Limits of Freedom of Contract. He starts here with the proposition laid down in the XII Tables that "what one has announced by word of mouth, is law." He knows of only one other enunciation of this as a broad principle appearing in a basic constitutional document; namely that in Art. I, Sec. XI, of our Constitution, "No State shall . . . make . . . a law impairing the obligation of contract." Inasmuch as no one has as yet shown the right manner of determining the method of the application of this principle, he says that in defining "the limits of freedom of contract we are dealing with the proper application of a legal norm." Further, "that the only norm which may be properly selected here as the highest principle is the idea of just law." A single application to a specific case may be taken as an illustration of his method.

In the case of *Stilk* v. *Myrick*[26] a master of a ship promised a sailor extra compensation for a return voyage, the sailor having already signed a contract for the voyage out and return. It was held in an action on the second promise that there could be no recovery, because there was no consideration for the promise to do what one was already bound to do for proper consideration. Stammler reaches the same conclusion on this point as does the English court, though he reaches it by an entirely different course of reasoning. His argument is as follows:[27] "Your obligation resulting from legal transactions must not be opposed to just law. But it would be opposed to it, if a person could let another bind himself by law to promise him compensation for fulfilling just law; because by recognizing such an obligation we in reality regard the command of just law as dependent upon a person's choice."

It will be readily seen that the solution put forward by the English Court rests upon a "principle" as defined by Pound.[28] It is a general conclusion used as a major premise to reach a solution in the particular case. Consideration is defined as "detriment to the

23. Ibid. pp. 161-166.
24. Cf. supra, Note 21.
25. "Justice" pp. 211-235.
26. 6 Esp. 129 (1810).
27. "Justice" p. 337.
28. 44 Am. Bar Assoc. Rep. p.

promisee." As one can suffer no detriment in doing what he has already promised to do for a sufficient consideration, no obligation arises from the second promise by which the promisee may be bound. On the other hand, Stammler's solution rests on the application of a norm or standard, which has been defined as "a means of reaching conclusions." Here we are applying the standard of just law and [illegible] would not be in accordance with such a standard f[illegible]ne to receive "compensation for fulfilling just law."

It will be seen that the solution of this problem as worked out by Stammler is in harmony with the theory of contract as laid down in the German Civil Code[29], Articles 145 and 151, and is in accord also with the suggestion of Pound[30] that those promises should be enforced "which a reasonable man in the position of the promisee would believe to have been made deliberately with intent to assume a binding relation."

It may be said in conclusion that Stammler's Theory of Justice is not a book to be read while lolling in an easy chair. One must get it between his elbows on a hard table top. But like most difficult tasks the results are abundantly worth the effort. The idea of justice so carefully clarified and simplified by Stammler gives us a true universal standard of justice, to which all laws may be made to conform, and under the inspiration of this ideal we may make a fresh start on the difficult task of the present day; namely, the restatement of our law in a consistent and understandable form.

JOSEPH H. DRAKE.

University of Michigan.

The Branch Banking Question by Ch. W. Collins. New York: Macmillan & Company. Pp. 182. $1.75. The title of the book explains its subject matter. In straightforward, nontechnical language the author tells what the legal status of branch banking, both state and national, is. Incidentally he makes clear the distinction, both legal and economic, between a real branch bank, exercising all the functions of a bank, and a mere branch office limited in its activities to receiving deposits and cashing checks. Only to a very small degree do the same arguments, pro and con, apply to both alike, although in popular thought they are often not merely confused but considered as identical. The legal exposition includes such recent developments as the McFadden-Pepper bill and the Hull amendments to it. It is so clearly put that one regrets the author's failure to do more than give the barest outline of the economic advantages and disadvantages of branch banking. Surely his treatment of the problem's non-legal side would have been no less informative.

29. German Civil Code, Art. 145. "If a person offers to another the making of a contract he is bound by the offer." Art. 151 "A contract is concluded by the acceptance of an offer."

30. Introduction to the Philosophy of Law, p. 282.

In *Annotated Forms of Agreement* (New York: Prentice-Hall, Inc. Pp. 919. $10.00). Saul Gordon has made a useful addition to the form books already obtainable. The present volume[1] is not confined, as the name would seem to indicate, to the agreements themselves, which both parties were destined to sign. It also includes other documents, of a unilateral nature but which grow out of such agreements. A noteworthy feature is that the reader is not asked to take any form on faith; each is introduced by a note giving its antecedents. Usually this is to a case in which the form in question was involved directly or indirectly in litigation and therefore presumably proved its worth. To a surprising extent these are very recent cases; indeed the agreements at once suggest their close connection with the most modern business problems (witness the ten opening forms dealing with advertising display). One criticism, however, is in point. The statement is prominently made that the forms are valid as guides in any State in the Union. This may well be true but the cases cited (about 402 in all) show a remarkable geographic distribution. Two hundred and seventy-four are from New York (many from the subordinate courts) and only 128 from all other jurisdictions. Of these the Federal Courts (including the Supreme Court) get thirty, Michigan eleven, Massachusetts nine, Louisiana eight and so on down. Illinois' Supreme Court contributes two. So far as New York views are also the views held elsewhere all this does no harm. So far as there may be (and often is) a divergence there is the danger that the author may have so concentrated on New York law as to have assumed that what it permitted would do equally well elsewhere, without being aware of such divergence.

Matthew Bender and Company, Albany, New York, are the publishers of an *American Prohibition Digest* (pp. 389, $5.00), covering federal and state cases decided from Oct., 1924, to Oct., 1925, that deal in any way with prohibition. It is planned to issue an annual volume to keep material up to date. The book thus forms a supplement to Blakemore on Prohibition, Mr. Blakemore being in fact the editor of the present digest. While the cases are arranged under the sections of the Volstead Act that they deal with, this has not prevented the editor from including several branch subjects which strictly speaking are not germane to the Act but whose presence makes the book distinctly more useful to the reader; such for example are the cases on carrying concealed weapons. The book seems well calculated to accomplish its purpose of bringing together in one mass the new authorities in its particular subject.

E. W. PUTTKAMMER.

1. A reprint, apparently unchanged in contents, of a book originally published in 1923.

Leading Articles in Current Law Reviews

Boston University Law Review, June (Boston, Mass.)—City Planning and the Constitution, by Philip Nicholas; Shakespeare and the Young Lawyer, by John E. Hannigan; Masters in Chancery in Massachusetts, by Bernard Ginsbury.

Columbia Law Review, May (Columbia University, New York)—Technical Rules of Evidence, by Irving Lehman; Commerce, Congress and the Supreme Court, 1922-1925, II, by Thomas Reed Powell; Non-Binding Promises as Consideration, by Arthur L. Corbin; Money as a Device for Measuring Value, by Simon H. Rifkind.

Columbia Law Review, June (Columbia University, New York City)—Ralph Waldo Gifford, by Harlan Fiske Stone; The Senate Reservations and the Advisory Opinions of the Permanent Court of International Justice, by David Hunter Miller; New York

Trusts to Apply Rents During a Minority After Two Lives, by Stewart Chaplin; Acceptances and Promises to Accept, by Herman N. Ginkelstein.

Harvard Law Review, May (Cambridge, Mass.)—Problems of Foreign Administration, by Herbert F. Goodrich; Judicial Review of Social Policy in England, by Harold J. Laski; Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence, by Henry W. Edgerton.

Illinois Law Review, May (Chicago)—Execution of Foreign Judgments, by John H. Wigmore; Legislative Program for Illinois Cities, by Francis X. Busch; Disparagement of Property, by Benjamin Wham.

Iowa Law Review, April (Iowa City, Iowa)—Jurisdiction Over Partnerships, Nonpartnership Associations, and Joint Debtors, by Donald D. Holdoegel; The Duty of the Lawyer to the Court, by Joseph I. Brody.

California Law Review, May (Berkeley, Cal.)—Account Books in California, by Clarke B. Whittier; The Recording of Acts and Titles by Adverse Possession and Prescription, by W. W. Ferrier, Jr.; Legislative Bill Drafting (Part I), by Paul Mason.

Virginia Law Review, May (Charlottesville, Va.)—The Legal Nature of Legislative Rules of Procedure, by R. K. Gooch; Supreme Court Condonations and Condemnations of Discriminatory State Taxation, 1922-1925, II, by Thomas Reed Powell; Responsibility of Corporate Control, by Lewis C. Williams.

Virginia Law Review, June (Charlottesville, Va.)—The Power of the United States to Alienate Federal Territory, with Special Reference to the Philippines, by Juan Ventemilla; Religious Freedom, by W. B. Swaney; Mandamus to Restore Academic Privileges, by Isaac A. Pennypacker.

University of Pennsylvania Law Review, June (Philadelphia, Pa.)—The Legislation of Hadrian, by P. E. Corbett; The Recent Property Legislation in England, by G. C. Cheshire; Power of Legislative Bodies to Punish for Contempt (concluded), by C. S. Potts.

Canadian Bar Review, May (Toronto, Ont.)—Stare Decisis, by E. K. Williams; The Progressive Codification of International Law, by Norman MacKenzie; Finality of Privy Council Decisions, by W. E. Raney; The Law of Real Property in Newfoundland, by R. Gushue.

Michigan Law Review, May (Ann Arbor, Mich.)—Jurisdiction Over Foreign Corporations, by Maxwell E. Fead; Pardons in Impeachment Cases, by Maurice Taylor Van Hecke; The Court of Claims, by J. H. Toelle.

Michigan Law Review, June (Ann Arbor, Mich.)—Contracts to Make Testamentary Dispositions as Affected by the Statute of Frauds, by Merrill I. Schnebly; Appeal of Death and Its Abolition, by William Renwick Riddell; The Doctrine of Price v. Neal, by Ralph W. Aigler.

Kentucky Law Journal, May (Lexington, Ky.)—Progress Under the Law, by Gardner K. Byers; The Ohio Company of Virginia, by Samuel M. Wilson; The Governor's Power to Remove County Officials, by Charles J. Turck; Exemption of College Fraternity Property From Taxation, by Harlan Hobart Grooms.

The Lawyer and Banker, May-June (Detroit, Mich.)—Unlawful Acts not a basis for Damages; Wills and Intestate Succession, by Jess G. Sutliff; Romance of Real Estate Titles in Texas, by Warren L. Scott; Common Law Trusts, by John T. Mulligan; Proper Record Books for Land Titles, by F. C. Hackman.

American Law Review, May-June (St. Louis, Mo.)—Why Justice Limps in Pursuing Crime, by George B. Rose; The Federal Trade Commission—Its Origin, Operation and Effect, by George C. Lay; Hasty and Local Legislation, by Harry R. Trusler; The Function of the Lawyer, by Percy Werner; Amendment of the Federal Constitution, by Thomas F. Cadwalader; Jurisdiction Over Nonresident Motorists, by Austin Wakeman Scott.

Indiana Law Journal, May (Indianapolis, Ind.)—Does "Legislative Review" by Court in Appeals From Public Utility Commissions Constitute Due Process of Law? by Maurice H. Merrill; The Treaty-Making Power With Special Reference to the United States, by Amos S. Hershey.

Cornell Law Quarterly, June (Ithaca, N. Y.)—Codification of International Law at Geneva, by George W. Wickersham; The Extent and Delimitation of Territorial Waters, by Henry S. Fraser; Trial of Actions Under the Code, by Charles E. Clark; Abandonment of Oil and Gas Leases, by Maurice H. Merrill; The New York Rule as to Nervous Shock, by Lyman P. Wilson.

Georgetown Law Journal, May (Washington, D. C.)—Intoxicating Liquor Law, by George Cyrus Thorpe; Rule Against Perpetuities in the District of Columbia, by Clarence Milton Updegraff; Restricting Location of Undertaking Establishments, by D. F. Lynch; Sanctions and International Peace, by O. R. McGuire.

Texas Law Review, June (Austin, Texas)—The Work of the Mixed Claims Commission, United States and Germany, by Marshall Morgan; The Problem of Jurisdiction, by Edson R. Sunderland; Commercial Arbitration in Texas, by Paul Carrington.

Marquette Law Review, June (Milwaukee, Wis.)—Judge Rouget D. Marshall and the Wisconsin Charity Doctrine, by Carl Zollmann; The Vested Powers of the United States Supreme Court, by Albert K. Stebbins; Cruel and Inhuman Treatment as Grounds for Divorce, by Clifford E. McDonald.

THE COLONIAL LEGAL SYSTEMS OF ARKANSAS, LOUISIANA AND TEXAS

Review of Legal History of Period When Territory of the Three States Was Under the Influence of the Civil Law—Vital Place Held by Custom of Paris in Louisiana—Its Simplicity and Variety—Judicial Organization and Procedure in Colony—Spanish Colonial Legal System—The Recopilación de las Indias

By Henry Plauche Dart
*Of the New Orleans, La., Bar**

I.

THE communities now called Arkansas and Louisiana were linked by LaSalle in 1682 with the remainder of the Valley of the Mississippi as units of the French colony which he named La Louisiane. The abortive attempt of the same leader in 1685 to found a colony on the coast of Texas checked but did not destroy French aspiration to include that region in the great plan that contemplated a continental colonial empire in the heart of North America, intended to sustain the French against invasion of the Valley by England's colonies on the east and by Spanish claimants on the south and west and intended also to create a vantage ground for attacks by the French on the mining wealth of New Spain. LaSalle's expedition and the wanderings of the explorer and his followers over the eastern hinterland of Texas laid the basis for the claim that Texas was part of Louisiana, asserted by the French Crown then and for many years thereafter. This pretension was kept alive after the Cession of Louisiana in 1803 and its shadow was not dissipated until the treaty between the United States and Spain in 1821, finally adjusted the Texas boundary as it now exists in relation to the rest of the Louisiana Purchase.

In 1699 France founded the colony at Biloxi, Miss., as notice to the world that she had taken physical possession of the extreme southern limits of La Louisiane, and she maintained this attitude notwithstanding the protests of Spain that the whole coast region from Florida to Mexico lay under the protection of that Kingdom. This Spanish protest was based primarily on discoveries and explorations in Florida, and the southern tier of what is now the United States, together with like efforts west and south of Texas without however having had physical possession of the latter. But in 1699 the protest was better founded on the fact that Spain had acted promptly (or as promptly as she ever acted) after LaSalle's adventure, to occupy the Gulf Coast at Pensacola and to establish missions, presidios and pueblos at San Antonio and at other places in Texas.

The colony planted by the French at Biloxi was in its nature a military outpost and it was soon connected up with the Country of the Illinois, the northern limits of La Louisiane, by another series of posts, chiefly located along and in proximity to the Mississippi, which was the main highway in that era for the traffic, the movement of population and the military operations of the French colony. A dominating position in this system was the Post of the Arkansas, which was established as early as 1686, thirteen years before Iberville's arrival at Biloxi. Situated on the Arkansas within easy reach of the Mississippi and about the middle distance between the extreme limits of the colony, it grew in importance, especially after the removal of the capital to New Orleans in 1722, and its maintenance and protection was a necessary part of French military and colonial policy. It retained its prominence as a trading post through all subsequent colonial mutations, and when Spain gave up Spanish Luziane in 1803 the Post of the Arkansas rose quickly in national interest as headquarters for western frontier trade, and became one of the principal communities in the District (afterwards Territory) of Louisiana created in 1804, when Congress sheared off the lower end of Old La Louisiane and called it the Territory of Orleans.

Not only was the Post of the Arkansas a subject of early concern to the French, but the whole area now comprised within the State of Arkansas was constantly exploited in France as a wonderland of gold, silver and precious ores and as being particularly rich in timber and fur-bearing animals. Its agricultural possibilities were not overlooked and the colonization of that part of La Louisiane was considered even before the people at Versailles began to think about a City at the mouth of the Mississippi. Indeed, Law's famous grant in 1719 of many leagues square in Arkansas preceded by three years the actual removal of the capital of the colony from Biloxi to New Orleans. Preparations on a vast scale had been made by Law to colonize his domain. His scheme included the transplanting of thousands of German farmers to Arkansas and his arrangements were all made and several shiploads had arrived at Biloxi and been rerouted to his grant before the financial crash in 1722 ended his wonderful career and changed the course of history in Arkansas. His abandoned settlers found their way to New Orleans and were there definitely located near the capital and became a valuable element in the population of that part of the colony.

The military aspect of the first era of colonization in La Louisiane gave way in 1712 to a form of government established in behalf of Anthony Crozat, to whom the colony was conceded by Louis XIV for the purpose of developing its agricultural, mineral and other riches. This grantee, after some years of operation, surrendered his grant, and a corporate overlord for the colony was created in 1717 under the advice of John Law, the financier of the Duke of Orleans, Regent of France during the minority of Louis XV. This corporation, called first the Company of the West and later the Company of the Indies, governed the colony for fourteen years and established it firmly in the place

*Address at the Tri-State Annual Convention, Arkansas, Louisiana and Texas Bar Associations, held at Texarkana, Arkansas-Texas, April 22, 1926.

it continued to fill in North America until its division between England and Spain in 1762.

The two grants, to Crozat and to the Company, are important to the legal historian, because through them the Colony was formally released from its military aspect and erected into a government, with all the paraphernalia of such institutions under the French method in the 18th Century, and because for the first time the colonists were now accorded the rights and privileges of French citizens. The protection of the law of France was extended to them and to their property, and among the rights thus acquired none were more important than the right to acquire, own and possess the soil of the colony in fee simple, with freedom from seigneural service and a special exemption from taxation during the period of the company's control. These beginnings of civil government in La Louisiane have an added interest and a particular application here, because it was through these documents and the contemporary regal legislation that the law of the land was established and tribunals created to administer justice in the colony.

We have previously noted that no serious attempt had been made by Spain to establish its authority in the region now called Texas until the alarm, caused by LaSalle's visit, but this quieted down when investigation disclosed the failure of his attempt at colonization. The matter, however, assumed another aspect when St. Denis, under the commission of Governor Cadillac of Louisiana, found his way to the Rio Grande in 1714 and repeated his visit in 1717. The rigorous prosecution of this affair at Mexico and the imprisonment of the leader had the effect of suspending further efforts to extend the jurisdiction of Louisiana, and in 1727 Mexico advanced the disputed territory into the position of a province of New Spain, with vaguely defined limits, and a name of its own, Tejas or Texas, after the tribe or confederacy of Indians of that name.

With the Spanish grip tightened on Texas and the French grip maintained on La Louisiane, the local authorities on either side had little to do beyond inciting friendly Indians in their respective territories to make unfriendly visits to their neighbors. The business of stealing Texas horses and Louisiana slaves with an occasional murder of unoffending whites and the felonious destruction of their habitations went merrily on throughout the wilderness from the Gulf to Canada for more than half a century and until the flag of France disappeared in the debacle of 1762. The scene of these efforts is now a country of another civilization which has largely forgotten its ancient rulers and cares even less for the history made in those days, save when it has to turn its mind restlessly back to the legal system of that era to adjust some complex problem of today by a re-examination of primary legal principles hitherto accepted without much regard to their source or origin.

The law of that period of life in Texas was like the law in La Louisiane, the offspring of a common parentage. Indeed, so very much alike that when in 1762 the warring English drove in the last outpost of France in North America and fixed the limits of Spanish authority at the Mississippi River, save for the little island on the east side that contained the City of New Orleans, the people of the city and of all western La Louisiane had no difficulty in maintaining their ancient civilization under the mild rulers who enforced the orders of the King of Spain and his famous Council of the Indies. For thirty-four years, that is, for the remainder of the 18th Century, and for the first three years of the 19th, one system of law governed New Orleans and the Spanish Provinces of Texas and Luziane west of the Mississippi, including Arkansas and all the territory northward to the undefined Canadian boundary line.

In 1801 Napoleon obtained for France from the subservient Spanish Government the retrocession of Louisiana as it was at the time of the treaty of 1763, and in 1803 received possession only to convey the whole thereof immediately to the United States, thus pushing back the Spanish line to a no-man's land which left open the question of the true boundary of ancient Louisiana, but nevertheless saved Texas in its full original integrity as a Spanish possession until revolution in Mexico wrested that country and with it Texas from the Crown of Spain. The succeeding period, 1803-1836, exceedingly fruitful in other aspects, is also of considerable interest to the historian of Texas law. Among the many changes of that era there stands out the action of the Cortes of Spain, which in 1820 abolished the system of entails and other features of the existing Spanish mediaeval form of land tenure. This was confirmed by Mexico in 1823, thus giving Texas at her revolution in 1836, a free hand to deal with her land problems, a matter at that moment of the greatest importance to the new republic.

II.

Let us now return over the way we have come to consider briefly the legal system that prevailed in Louisiana and Arkansas anterior to the elimination of France as a continental power in North America. We have already noted that Civil Government began in La Louisiane with the grant to Crozat in September, 1712. The Letters Patent or Edict by which this was accomplished sets out in its 7th Article, that "our ordonnances and the custom and usage of the Prevoté and Vicomté of Paris shall be observed for law and custom in the said country of Louisiana," and this was revived and amplified in the Charter of the Company of the West, granted in 1717, which provided that "the judges established in all the said places shall judge according to the laws and ordinances of the Kingdom and conform themselves to the custom of the Prevoté and Vicomté of Paris pursuant to which the inhabitants may contract without the possibility of there being introduced any other Custom."

There is no real conflict in the distinction made in these enactments between the Laws and Ordinances of the Kingdom and the Custom of Paris, for they were all concordant parts of the Law of France. There was then, as there is now, a distinction between public and private law, and these grants put into operation in Louisiana the political rule that the King was the source of all authority, at once the sole legislator and the sole judge; that all rights emanated from him and that the people were his subjects over whom he had the power of life and death. There was no constitution to regulate the conduct of government and to guarantee the privileges of the citizen. Neither was there any trial by jury, nor a judiciary wholly free from the influence of the Crown, though French history preserves some illustrious examples of fearless judges. Yet, when this commonplace of history has been restated it remains a fact that the people who lived in Louisiana during the reign of Louis XIV and Louis XV, that is, during the period 1699-1769, were governed by laws that could not be disobeyed even by the King, who was hedged about by centuries of established principles, and methods of administration that could not be disregarded nor overthrown. Notwithstanding sporadic abuses of power, it can be said that under French rule in all

that concerned life and property the people of Louisiana were as secure in their rights as we are today. They enjoyed, moreover, a general freedom from tyranny and oppression that tended to create a certain independence of thought and action, so much so, that during the French period a contemporaneous official critic said that they had "become republican in their thoughts, feelings and manners."

Under the public policy of France, a colony could be kept in hand as a Crown possession, or it could be lifted into autonomous activity under a form of government and rule of law, general or special. When the Edicts of 1712-1717 were promulgated, the first effect was to open Louisiana to settlement with the special privileges already recited while the wider gift of all the laws of France carried the body of legislation that had established certain principles of government and law for the welfare and protection of the subjects of France. To attempt to recite here any considerable portion of this slow accretion of the preceding five centuries would be as uninteresting as an index to the acts of the legislature, but it may be said briefly that anterior to the reign of Louis XIV, many preeminent statutes had created the method of proof in civil and criminal cases, the right of the wife to dower in the property of her husband, the separation and limitation of civil and ecclesiastical jurisdiction, the abridgement, and the beginning of the extinction of ecclesiastical ownership of land and serfs, the enfranchisement in 1315 of the serfs occupying the Royal Domain with its resounding declaration that according to the law of nature all men are born free, the rules for the protection of minors, for the publicity of marriages, for the confection of wills, in short, a great system touching the entire administration of government and law in a civilized community. The reign of Louis XIV (1643-1715) added to this collection still further legislation in the nature of a restatement and codification of the law of France, and the succeeding reign (Louis XV) brought that system to a state of completion that left little to the writers of Napoleon's Codes but the classification, simplification and co-ordination of the ancient system and its amalgamation with the new theories of government and administration brought in by the Revolution and by the concentration of political power under the Empire.

All this ancient regal legislation extending over many centuries was in its nature the original creation of a system of law, to supply the deficiencies of the primary law of the Kingdom which in its inception was customary, that is to say, a growth from tribal usages to a fixed system applicable to the communities in which it existed. France had found its "place in the sun" by combining many units of territory into one Kingdom. The early Kings took with these units the customs, laws and regulations in force in their respective areas; these communities traced their customs to either Roman or Germanic sources, and at the date of the political unification of France all the customs were infected with principles drawn from germanic, roman, canon and feudal sources without, however, approaching uniformity and, of course, without having effect beyond the borders of each Custom. There was one essential difference between them growing out of the situation at the origin; thus in the north of France the Custom was based on the Customs that were in force before Caesar's time and that were brought in at the Germanic Invasion, whereas the roman population in the south of France retained after the Invasion the law of its origin (the Roman law) as a Custom based on the written law. No Custom was at any time a system of law complete within itself, and eventually great confusion arose out of the conflicts of opinion in the different jurisdictions, while the ardent propaganda of the jurists and the occasional intervention of an Edict from the King added to the legal chaos. At last, in 1452, Charles VII ordered the Compilation of all the Customs. This work, called the Redaction, occupied the best legal minds of France for a century. The revision had a practical result in so far as it placed all the Customs in written form and found common expression for common principles, but the residuum of variation was still so great it was necessary to provide that in all cases where no provision existed, or where there was conflict or doubt or obscurity, the judges should decide according to the Custom of Paris. This particular Custom was redacted in 1510 and materially revised in 1580, and in the old law of France it was called "the flower of the Customs."

The Redaction of the Customs of France was executed with the consent of all the localities in interest, it received the approval of the local judges, and the Parliament of Paris registered and promulgated each redacted Custom. This grave and momentous step in the Codification of the Custom was surrounded with all the pomp and ceremony that the genius of France could devise, with the purpose of establishing the Custom as part of the permanent law of the land. This procedure fixed forever the status of the Custom in France, and the approval and signature of the King gave it the force of a written law "to be observed as a statute, a perpetual and irrevocable Edict."

From this period and henceforth, until the confection of the Codes of Napoleon, there coexisted two sources of law in France. The lawyers became specialists and after the manner of the age the schools of thought divided, one faction steadfastly contending that the common law of France was customary, the other that it was the Roman law as modified by the legislation of the Kings. The struggle created great lawyers, their opinions were reflected in the jurisprudence of the times, passed into Edicts of the Kings, and ultimately were embodied in the law of France and of Louisiana, for the Civil Code of France and the Civil Code of Louisiana are today a mixture of Customary and Roman law, just as the Civil Law of France at the birth of Louisiana commingled the same elements.

Inasmuch as at that date (1712-1717) all France had its local law and no unit of the Kingdom agreed upon the Custom of the other, and inasmuch as these Customs and the general legislation of the Kingdom were complementary parts of the same system, it was necessary to designate a Custom for Louisiana, for without such designation there would have been a hiatus in her legal system. The Custom of Paris must therefore be considered the local book of law and practice for Louisiana, just as the Custom of Paris and other Customs of France were in like relation to the respective territorial departments of the Kingdom. It might also be safely added that here the Custom was the paramount law in all matters covered by it where the general legislation or the special Edicts of the Kings had not explained, qualified, added to, or abrogated it.

As received in Louisiana in 1712, the Custom of Paris was a written code, covering remedies and rights, so much akin to existing provisions of the Civil Code and Code of Practice of Louisiana, that we would recognize the similarity even though we did not know that the Custom was absorbed into the Napoleonic legislation, from which our Civil Code derives so much

of its vitality. This local law of French Colonial Louisiana is a model of brevity, comprised within three hundred and sixty-two numbered articles of an average length of less than fifty words to the article. This matter is distributed under sixteen titles and aside from the first two, which treat of the relations of lord and vassal, there is no part of this book that did not have application to the affairs of the colonists of Louisiana, and some of its principles are still the law there today.

We should not leave the subject without illustrating briefly the simplicity and variety of the Custom, thus, the third title opens with the statement that "in the Prevoté and Vicomté of Paris there are two sorts and species of things only, to-wit, movables and immovables." The Civil Code of Louisiana (Article 46) says, "the third and last division of things is into movable and immovable." It will be noticed that the Custom of Paris here opens with the words that in our law today close the general definition of Things, but the remaining eight articles of Title III of the Custom contain the elements, or beginnings, let us say, of all the vast jurisprudence that is now compressed into the thirty-nine articles of Title I of the Civil Code of Louisiana on the subject of Things. Of course, it should also be noticed that the differentiation of Things in both Custom and Code is directly derived from the Roman Law. Under the caption of Action in Seizen (Title IV) we have the principle of the possessory action of Louisiana whose primary object is to reinstate a disturbed or evicted owner of real property and to throw upon the other party the burden of establishing title.

The Louisiana hypothecary action, the plea in compensation, the plea in reconvention, these and other things of similar import all find their roots in the practice under the Custom. We find here also the Louisiana law of Prescription (Statute of Limitations) in its aspect as a method of acquiring property with or without title and in its common phase as a method of discharging debts and obligations, another importation from the Roman Law. On a subject of momentary importance in this part of the world, the Custom of Paris is very explicit. Title X treats of the Community of property as to which old Claude de Ferriere, its annotator in the time of Louis XIV, says:

> The community of goods which forms the subject of this Title is a partnership (Societé) formed in the country of the Customs by the marriage between the future husband and wife in the movable property and immovable acquisitions made and maintained during the marriage. This partnership has effect in all of Customary France except Normandie, Reims and Auvergne. It results from an express stipulation or by the terms of the Custom of the place of the domicile of the parties and where the marriage is contracted without any agreement on the part of the contractants.

The 220th article of the Custom of Paris says:

> Men and women joined together in marriage are common in movable property and immovable acquisitions made and maintained during the said marriage and the community begins on the day of the espousal and nuptial benediction.

This 220th Article of the Redacted and Revised Custom was Article 110 of the Ancient Custom of Paris, and its origin beyond that compilation is lost in the mists of the old Germanic Customs. But it is certain that this principle lies at the foundation of every Custom that traces back to the days of tribal law in northern Europe. A partnership in some shape or other always followed the relation of husband and wife in Ancient Gaul, and it maintained itself in France through all the ages to come and was the Customary Law of a great part of that country at the time of the Codification by Napoleon.

More than enough has been said to show the vital and important place held by the Custom of Paris in the legal system of La Louisane during the French era, but as the State of Louisiana still retains many of its principles in her legal system, it may not be indiscreet to add that through it we are enjoying a system older than the Common Law. Before the Courts of England had begun to formulate the great rival of the Civil Law, the ancient but vigorous Custom of Paris was intrenched and observed across the channel. It sustained itself against all comers, receiving and assimilating, but never losing its own distinctive virtues that still flower in the Code of Louisiana.

When Civil Government was organized in La Louisiane concurrently with Crozat's Grant an anomalous system was created that was purposely maintained throughout the Colonial Era. The principle was a division of executive authority between the Governor and the Commissaire Ordonnateur with no fixed demarcation of their duties. The Governor was the titular head, but the Commissaire Ordonnateur (an untranslatable title) exercised the powers of a French Intendant of Justice, Police and Finance. In these capacities he controlled the income and expenditure of the colony; was charged with the suppression of disorder and the prosecution of offenders, and was President of the Superior Council and Presiding Judge on its judicial side. History tells us much about the French Governors of La Louisiane and something about the Intendants, but the student of her legal institutions soon feels the influence of this powerful official; he was an all pervading presence; like Martha, busy about many things, his work survives in the judicial archives of the colony and commands a respect that his highly ornamental coadjutor seldom receives.

The Judiciary of the colony was established by royal Edict of 1712 creating a Superior Council as the sole tribunal of the colony with exclusive civil and criminal jurisdiction throughout the length and breadth of the land. Its membership was fixed at seven, among whom one was named by the Crown as First Judge, with all the powers of the Presidents of the Courts in France, and this office was always held by the Commissaire Ordonnateur. The Superior Council was made a permanent institution in 1716, and under the Company of the West in 1719 its powers were extended and enlarged, and thereafter it continued to function throughout the French era. It was at once a probate court and a court of law and equity. Matters arising away from the capital were heard before the local Commander, who could summon a council of like composition to assist where the issue required such attention, but an appeal lay from that jurisdiction to the primary body at Biloxi or at New Orleans after it became in 1722 the seat of justice.

While the membership rolls included the chief officials of the colony there was always a representative minority chosen from the nonofficial class. It was by its composition a body of laymen with one exception, the Procureur General, but its archives show an intelligent appreciation and disposition of the many difficult problems the Council had to solve. Speaking from its records the methods of procedure before this body were exceedingly simple, pleadings were by petition and answer, and it was permissible to urge in the latter all the exceptions and defenses which in France could be pleaded separately. It is also not improbable that after the initial plea which opened a law-

suit the remainder of the process was oral, at the discretion of the other parties. Proof was offered in accordance with the rules prescribed in the Civil Ordinance of 1687. A writing excluded all other evidence, oral testimony if given was under interrogation of the Presiding Judge or an auditor appointed by him from the membership of the Court. There seems to have been no right in the parties to direct the trial. The judge was the sole seeker after the truth. Even the Procureur was silenced under this system. Judgment in civil cases required the concurrence of three members of the Council and five in criminal cases, and a clerk kept its minutes and records.

Procedure in all classes of cases except prosecutions for crimes followed the forms of practice in France before the Chatelet of Paris, a Court primarily devoted to the enforcement of the Custom of Paris. But the Superior Council had also to construe and enforce the statutes concerning its own jurisdiction, the several grants to Crozat and the Company of the West, and the Edicts, special and general, of the Crown. The Civil Ordinance of 1667 and the Criminal Ordinance of 1670 were constantly in use before it, covering as these statutes did the whole field of French Civil and Criminal procedure. During its long career, there came before the Superior Council every conceivable question of law and fact that could disturb the public peace or involve the rights of private litigants. It sat daily and worked hard. It was served by a Procureur appointed by the King and he was the legal adviser and only lawyer in the establishment. He had many duties of a professional character, but an unusual one was the duty to sum up every issue and give the Court an unbiased opinion, whether for or against the government or the parties *pro* and *con*. His "conclusions" were generally reduced briefly to writing, but many of them were well considered and carefully presented statements of the fact and the law.

The judgments of the court were preceded by a brief resumé, something akin to modern reasons for judgment, but more nearly resembling the familiar form of the High Court of France. All judgments were signed by the necessary number of members of the Council and frequently by all of them. The execution of these judgments was controlled by orders to its executive officer, the huissier or sheriff of the Court. The Judges were paid by the Crown, but the costs of Court were taxed according to a schedule or fee bill revised from time to time by the Council. While the Edicts creating this body vested plenary and final jurisdiction in the Council, a right of review of its judgments was always exercised by the Council of State at Versailles. This remedy was, however, a matter of grace, not of right, and it was exercised by notice given by the aggrieved party of the intention to appeal, followed by original procedure in France for a review.

Besides its judicial function, the Superior Council was the notarial depository of the Colony and the place of registry of the vital statistics of the day. Here also were recorded those marriage contracts in which provisions were made for mutual gifts or for the establishment of dower. Private and public agreements and contracts, wills and scores of other matters were deposited in its archives, and the registry thereof was notice to the world and created proof by writing which was a cardinal feature of the rules of evidence of that period.

The Council also exercised some municipal functions, chiefly regulations of public order, but this seems to have been an assumption of power not contemplated in its creation. There is ample evidence the Intendant exercised this power as a prerogative of his office and there were times indeed when the "usurpations" of the Council were the subject of hot complaints to the home government. On this point it may be said that the tribunal was intended to be an instrument of limited powers. It was to be the mouthpiece of the Crown and of the local representatives of the corporate interests under whose control the body began its existence, but it was not always subservient; it often failed to function along expected lines; it was often in contempt of constituted authority, it was purged and suppressed and set up again, but in truth it could never wholly be depended upon to carry on against its own convictions. The last act of its official life was to revolt against the Spanish transfer of 1763, its last "usurpation" was its assumption of the reins of government in the interregnum before O'Reilly's army marched into New Orleans in 1769 and extinguished the Superior Council in the blood of its patriotic leaders.

We have at the Cabildo in New Orleans thousands of documents preserving the labors of this tribunal during more than fifty years of life in La Louisiane in the 18th Century, adjudications covering every kind and species of litigation wherein the Custom of Paris and the Great Monuments of the general law of France were in constant application, a body of historical evidence justifying the statement that liberty and protection of life and property under the law of France was the guiding principle of this primitive court of the fine old days when Louis was King in La Louisiane.

The Council during that entire period was a fixed element in the life of the people of New Orleans, and in that part of the old colony now comprised within the boundaries of the State of Louisiana. No son of that soil can rise from a study of these records of the ancient regime without understanding the reasons that in 1803 kept the native born of Louisiana, their children, and their children's children true to a system of law that had its roots deep down in the history of their race.

(*Concluded in August issue.*)

DEPARTMENT OF PROFESSIONAL TECHNIQUE*

The Federal Employers Liability Act[1]

By George Allan Smith
Of the San Francisco, Cal., Bar

THE Act passed in 1908, and amended as to two sections in 1910 was declared constitutional in the Second Employers Liability Cases 223 U. S. 1. In disposing of the contention that the regulation of interstate railroads towards their interstate employees was not a regulation of interstate commerce, and therefore not within the authority of Congress, the court said:

"The duties of common carriers in respect of the safety of their employees while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power" to regulate interstate commerce."

The first Act of 1906 was in the Employers Liability Cases 207 U. S. 463, declared unconstitutional because it reached beyond the interstate business of the carriers. That Act made every interstate common carrier, whether by railroad or otherwise, liable to any of its employees for injury, whether or not at the time of injury, either the carrier or the employee was engaged in the interstate business of the carrier.

The present Act of 1908 is restricted to injuries suffered by the employee while engaged in interstate commerce. Also it applies only to railroad common carriers.

1. The Act provides compensatory damages to employees for injury, or in case of death to the beneficiaries named in the statute, resulting in whole, or in part from the negligence of the carrier, or any of its employees. It thus abolished the common law fellow servant rule.

2. Contributory negligence is not a bar to the action, but goes in diminution of damages in proportion to the amount of negligence attributable to the injured employee, which is to be determined by the jury. But where the injury is caused or contributed to by the negligence of the carrier in failing to comply with any Federal act enacted for the safety of railroad employees, the employee cannot be charged with contributory negligence. (Seaboard Air Line R. Co. vs. Horton 233 U. S. 492.) Section 3 of the Act provides:

> That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

3. Assumption of risk is a bar to the action as at common law, except where the injury is caused or contributed to by the negligence of the carrier in failing to comply with any Federal act enacted for the safety of railroad employees. Such failure is what is sometimes called negligence per se.

4. The carrier cannot by any previous contract for employees' relief, or other device, the purpose or intent of which is to exempt the carrier from any liability created by the Act, relieve itself from the liability imposed by the statute. (Phila. B. & W. R. Co. vs. Schubert, 224 U. S. 603.) But it may set off any sum it has contributed or paid to any insurance relief benefit, or indemnity that may have been paid to the injured employee, or the person entitled thereto on account of the injury or death.

5. Suit must be brought within two years from the day the cause of action accrues. (Central Vt. R. Co. vs. White, 238 U. S. 507; Atlantic vs. Burnett 239, 199.) It may be brought in a Federal or State court. If brought in a state court the Act provides that it shall not be subject to removal to the Federal courts. (Kansas City vs. Leslie 238 U. S. 599.) This includes diverse citizenship as well as other causes named in the removal statutes. The removal statutes are not applicable to actions brought under this Act. It is possible, however, that it does not prohibit a removal where it appears that on account of prejudice a fair trial cannot be had in any of the state courts to which the cause could be removed on such grounds.

6. In case of death suit must be brought by the personal representative of the deceased, an administrator, executor, or other similar personal representative designated by the state law. In the same suit the representative may not only recover for the pecuniary damages suffered by the named beneficiaries, but also for the benefit of the same beneficiaries, the damages suffered by the deceased prior to his death, including those on account of conscious pain and suffering.

Suit may be brought in a United States district court in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action. The action is of a personal character and therefore transitory. It may be brought in any state court having jurisdiction to hear and determine similar causes of action, if jurisdiction can be had of the carrier by the service of summons within the state in compliance with the rule on that subject laid down by the United States Supreme Court in the Pennoyer case, 95 U. S. 714. This would not seem to include the place where the cause of action arose if brought in a state court, unless at the time suit was brought

*A clearing house of practical information as to points of law and procedure, better ways of doing things, pitfalls to be avoided, etc., arising from the experience of various members of the profession.

[1]As construed by the United States Supreme Court. This is the first of a series of brief articles on this subject by Mr. Smith.

personal service of process could there be had on the carrier.

From the plaintiff's point of view the state courts are frequently to be preferred. Their attorneys are, generally speaking, more familiar with practice in the state courts, and feel more at home there in presenting the case. Laws in many of the states limiting the judge to advising the jury on the principles of law applicable to the case; the preparation and form of instructions; the practice as to the permissible extent of cross-examination, impeachment of witnesses, and other matters of state practice not adopted by the Federal courts; the latitude permitted in addressing the jury; the drawing of the jury panel from local territory; a permissible verdict by a less number than the whole jury, and the difference if any between the inclination of the local Federal judges and the state judges to leave close questions of fact to the jury, are matters to be considered in the choice of forum between the state and Federal courts.

The injured employee, if he brings the suit, will, of course, be the plaintiff, for none of the other beneficiaries are entitled to damages if he is alive. In the event of his death prior to a recovery, suit must be brought in the name of the personal representative. Even if the widow be the sole beneficiary she cannot bring the suit in her personal capacity, nor is she as beneficiary a proper party plaintiff, unless, perhaps, if the state practice permits, she is joined for the precautionary purpose of protecting her rights in the course of the litigation. The rule is the same if the sole beneficiary is a minor having a guardian, or an incompetent having a conservator. It is the personal representative of the deceased that is designated by the statute. The Federal Act is specific on this point, and the state laws are not applicable. (American R. Co. vs. Birchol 244 U. S. 547; Missouri K. & T. R. Co. vs. Wulf 226 U. S. 570; Pecos & N. T. R. Co. vs. Rosenbloom 240 U. S. 439.)

The defendant is the carrier employer. Other carriers whose negligence as in case of a collusion, etc., may have contributed to the injury, or fellow servants for whose negligence the carrier is sought to be charged, are not proper parties defendant. The cause of action is created by the Act. It is confined to the employing carrier. Whatever cause of action may exist against fellow servants, or others whose negligence may have contributed to, or been a joint cause of the injury, does not arise under the Act but from other sources, such as the common law, or state enactments. They are therefore distinct and separate causes of action from that against the employing carrier. Lee vs. Central of G. R. Co. 252 U. S. 109.

It may sometimes be thought advisable to join a co-employee, or another carrier in the suit against the employing carrier, if permitted by the state practice. It is, however, a dangerous practice, because the rules of liability may not be the same, or evidence may be admissible against the other parties which is not admissible against the employer, and of so prejudical a character as to substantially injure the employing carrier, and thus tend to deprive it of a fair and impartial trial as to its own liability under the Act. One of the necessary effects of a joinder is to inject additional issues into the case, and thus complicate its consideration by the jury.

The complaint should conform to the state practice if filed in a state court. Atlantic C. L. R. R. Co. vs. Mims 242 U. S. 532. After the names of the parties plaintiff and defendant, it should allege that the defendant at the time of the injury was an interstate common carrier by railroad between the states, or a territory and state, etc. of the United States, or between a state and a foreign nation: That the plaintiff was an employee of the carrier, and the facts showing that he was engaged at the time of the injury in work pertaining to its interstate transportation business—as that he was a switchman handling in the course of his duty an interstate car—a track employee caring for the interstate tracks, etc., as the case may be. It is unnecessary specifically to mention or count upon the Federal Act. If the facts plead show an injury to an employee in the course of interstate transportation it is sufficient. All courts are bound to take judicial notice of the applicable law. (Kansas City W. R. Co. vs. McAdow 240 U. S. 511; Atlantic C. L. R. Co. vs. Burnette 239 U. S. 199.) Also the usual allegations as to how the injury occurred showing that it was due to the negligence of the carrier, or those for whose negligence the carrier is responsible; the extent of the injury, the age of the employee; his condition of health, as robust or otherwise; his earning capacity at the time of the injury and the extent of its impairment in case of a permanent injury, or one that will have future effects; and such other allegations as the circumstances of the case calls for to show the full damage, such as a bodily mutilation or disfigurement that may be the cause of shame and humiliation.

If death resulted there should be set forth the names of the beneficiaries, their relationship to the deceased, their ages, condition of health and other circumstances to show the extent of their dependency upon the earnings of the deceased, what they could reasonably have expected in the future from him if death had not intervened, and all other facts necessary, of an issuable character required by the state practice to show the full amount of the pecuniary damage they may have sustained. The damages will be usually stated as a lump sum representing the combined loss of all the beneficiaries, leaving the extent of the individual pecuniary expectancy of the various beneficiaries to be disclosed on the trial, unless the state law otherwise requires in similar cases where recovery is sought for negligent injuries.

The beneficiaries are divided into three distinct classes. If there is living any member of a prior class, no member of a subordinate class is entitled to share in the recovery. "The widow (or husband) and children, if any, are entitled to the whole recovery. If no widow (husband) or children, the parents take it all. If no parents the next of kin, dependent upon the decedent become the beneficiaries." Taylor Admr. vs. Taylor 232 U. S. 363.

In the White case 238 U. S. 507, the court, as to the apportionment of damages said: "The Act does not require the jury to apportion the damages among the beneficiaries." In the Leslie case 238 U. S. 599 the court said that the language of the Act does not expressly require the jury to report what was assessed by them on account of each distinct liability, and in view of the prevailing con-

trary practice we cannot say that a provision to that effect is necessarily implied.

If the jury is not required to apportion the damages, it follows that they need not be apportioned in the complaint. The carrier is not interested in the apportionment of the damages among the beneficiaries. It is liable for the full amount of them. It is true that it may be convenient, and advantageous for the carrier to know in advance of trial the extent of the claimed dependency of each beneficiary, especially as to the next of kin class, in order to prepare itself to meet such claims. In such case a bill of particulars upon a showing of necessity therefor would seem fair, if customary in similar cases under the state laws.

Freedom from fault is not a necessary part of the plaintiff's case. Contributory negligence only goes in dimunition of damages. It is therefore unnecessary to allege in the complaint due care on the part of the injured employee. The burden of proof of contributory negligence is on the defendant. This is a matter of substantive general law as to which the Federal rule is controlling, despite any state statute or rule of practice to the contrary in negligence cases. Central Vermont R. Co. vs. White Admr. 238 U. S. 509. It is not advisable for the plaintiff to anticipate this defense. If such allegations are made in the complaint, the defendant under the practice of many of the states, would by a general denial be relieved from the necessity of specifically pleading it.

Assumption of risk is a complete defense. The burden of proving it is on the defendant. Kanawha & M. R. Co. vs. Kerse Admr. 239 U. S. 576. Where a statement of the facts of the accident in the complaint show circumstances of assumption of risk the complaint might be demurrable unless it also alleges the additional facts showing that the doctrine is not applicable, as that the employee was induced to, or did continue work in reasonable reliance on a promise of the carrier to remedy the dangerous condition, or that because of immaturity, inexperience or other cause, the employee did not fully appreciate the danger, or that the employer had assured him that the condition was not dangerous to him.

If the case requires the plaintiff to rely upon the last chance doctrine the facts should be pleaded in the complaint showing that the carrier, or those for whose negligence it is chargeable, knew of the perilous position of the employee in time to have avoided the injury to him by the exercise of reasonable care, for that is the only negligence of the employer in a last chance case, except in a case where original negligence of the employer appears, also assumption of risk by the employee, and the final act of negligence chargeable to the employer under the last chance doctrine.

If the pleader is in doubt whether the evidence will make a case under the Act, or under the state law, the complaint should be broad enough to state a case under both laws. From the Federal standpoint there is no objection to this being done, either by a direct or alternative statement in the same count, or in separate counts. The state practice is applicable to that matter. Lee vs. Central of Georgia R. Co. 252 U. S. 109.

The answer, if contributory negligence is relied upon, and it almost invariably is, should plead it, unless the plaintiff had so alleged freedom from fault, or the exercise of due care as to permit the issue to be raised by a denial under the state practice. If assumption of risk, which under the Act far overshadows the partial defense of contributory negligence, is relied upon, the facts giving rise to that defense should be plead. The mere allegation that the plaintiff assumed the risk is a statement of a conclusion of law. But if the facts alleged in the complaint show assumption of risk, and seek to avoid its effect by further allegations, a denial of the exculpatory allegations would under the practice of many of the states, be sufficient to raise the issue of assumption of risk. However, to avoid any question on the point it is well to plead it separately as a defense.

If the state practice necessitates a reply to raise an issue on affirmative defenses, or new matter alleged in the answer a reply should of course be made conformably therewith.

Courageous Judges

"From time to time during the past year or two, The Chicago Bar Association has expressed itself on the subject of courtroom photography, and its efforts were largely instrumental in obtaining the adoption of a prohibitory rule in the trial courts of Cook County. Occasional unpunished violations of the rule have only served to emphasize its necessity.

"Many judges seem either too sensitive to the pressure of the newspapers or too eager for the personal publicity incident to the publication of photographs of scenes in their courtrooms; therefore the recent courageous action of a Baltimore judge in sentencing to jail three editors and two photographers who defied his specific warning given at the beginning of a murder trial deserves the widest possible publicity and endorsement, with the hope of suggesting similar action by other judges the country over.

"In the press comment on the Baltimore case a distinction has been suggested between the case of flashlight photographs and time exposures, the former to be forbidden as noisy and offensive and obviously detracting from the dignity of the courtroom, the latter to be permitted as a legitimate means of presenting the courtroom story to the public. But this distinction takes note only of the momentary disruption of the business of the court for posing and the explosion of the flashlight. It ignores the fundamental objections to a practice which disturbs the orderly processes of the courts, presents trials as spectacles rather than solemn judicial inquiries, and disregards the right of litigants or persons compelled to attend in court to be protected from unnecessary humiliation.

"The rule against all courtroom photographs has in large measure been enforced in the Courts of Cook County, and those judges who observe the rule have the full support of this Association. Due, however, to the natural eagerness of journalists to give their public what they believe it wants, there have been flagrant and most regrettable violations. Moreover, the fact that some of our judges permit the practice to continue strongly tends to impair the dignity of all our courts.

"The court order prohibiting photographs should be strictly enforced."—From Chicago Bar Association Record, May.

UNITING BAR ASSOCIATIONS

Success Achieved by Voluntary Bar Affiliation Plan in the State of Washington—Outline of Constitution Embodying this Idea—Avoids Delay Due to Legislative Slowness in Adopting Proposals Emanating from the Profession

By Joseph W. McCarthy
*Of the Spokane, Washington, Bar**

THIS article is intended to invite consideration of the question of securing closer unity between local or county bar associations and respective state associations.

We are all justly proud of what our various local and state associations have done and are doing in raising standards of professional education and ethics, sustaining the dignity of the bench and bar, recommending desirable legislation, fostering loyalty and in various other manners and means. So far, however, as acting in harmony is concerned, they are for the most part ropes of sand. Practically all members of the bar have long recognized this and are satisfied that the power, influence and membership of both state and local associations would be greatly enhanced could a more direct organic union between them be obtained. Many members of the bar recommend that the state association be so organized that it will virtually consist of the membership of the various local or county associations. They assert that it is but the application to the organizations of our profession of the same principle that obtains throughout the country with reference to various social, economic and fraternal organizations, as well as in the case of the American Medical Association.

It is asserted that the time for this cooperation and unity was never more urgent. With modern means of communication unifying broad expanses of territory, sustaining populations running into the millions, the influence of the small group or individual is proportionately diminished except as it is made felt through cooperation with those of its, or his, kind or class. There are those who look forward and hope for a time when all of our various bar associations—national, state and local—may be welded together into one component whole, in such manner that admission into a local or county association will carry with it admission into the respective state association as well as into the American Bar Association.

If we who are more active in our local or state association can do anything toward hastening that time, it will be by getting our own house in order. It has been well said by a former president of the American Bar Association, in an article hereinafter referred to, that "Any plan for a federalized and fairly complete organization of the bar rests on the pillars of increased strength in the state associations." When the various local associations have become welded into the association of the respective states in which they are, it may be that the American Bar Association can and will make provision by which the entire membership of the state associations may become members of the American Bar Association. In other words, unless or until the various county and state associations obtain a closer affiliation or unity there cannot be much progress toward consolidating these into the American Bar Association.

This article deals with voluntary bar associations. There is, of course, another form, consisting substantially of organizing the entire bar of the state into a compulsory organization, or corporation, based on legislative action. This obtains in Idaho, Alabama and North Dakota. Much merit is claimed for the plan. It may be that ultimately such plan will be quite generally adopted. It would seem, however, that much time will be required. Legislative action is at best slow, and sometimes legislatures are unduly influenced by those not friendly to the legal profession. If the plan secured through legislative action be the more desirable, it would seem that we can only hasten the time of its adoption by first going as far as we can in a voluntary way. If for no other reason than to secure that end, we should strengthen our voluntary organizations, in order that we may the quicker influence or force the proper legislative action.

This article will be devoted mostly to one form of organization commonly referred to as the "affiliation plan." By it, the state association consists virtually of the local or county associations. The subject seems naturally to divide itself into three heads: First, What is the "affiliation plan"? Second, How may it be adopted? and Third, What has been the experience where adopted? I shall try to discuss, or perhaps rather illustrate, these from reference to the plan or experience of my own state — Washington — first, because I am most familiar with them in that state, and second, because I think Washington was the first state to adopt a plan amounting to complete organic union.

First: In defining the "affiliation plan", it may make for clearness to set out an outline form of constitution:

CONSTITUTION OF THE ———— STATE BAR ASSOCIATION

Articles I and II—Name and Objects.

Article III—Membership. (a) Honorary. (b) Regular i. e. members of affiliated locals. (c) Individual—non-members of affiliated locals.

Article IV—Officers: President, secretary-treasurer, district vice-presidents—all constituting the Board of Trustees—the two former elected, the latter appointed by the president.

Article V—Dues. At the annual meeting and immediately following their selection, the Board of Trustees shall determine upon a budget deemed sufficient to meet the association purposes for the ensuing year, and apportion same to the respective counties, in proportion to their

*Chairman of committee which drafted the present Constitution of the Washington State Bar Association.

population as determined by the last federal census. The secretary-treasurer shall at once advise local associations of their respective portions of the budget and thereafter cooperate with district vice-presidents and local officers in securing its contribution. It shall be the particular duty of district vice-presidents to use diligent efforts to cause county apportionments to be raised, either through the recognized local county association, or otherwise, and to cause local associations to be organized and affiliate in all counties within his district. "Regular members" shall pay no dues direct to the association. "Individual members" shall pay dues of $———— per annum.

Budget apportionments shall be due and payable to the secretary-treasurer immediately on their determination, and shall be delinquent four months thereafter. When the secretary-treasurer shall receive from any local association its apportionment of the budget, he shall retain same in a separate fund for the use of such local association until he shall have likewise received at least 60% of the total budget, at which time all receipts then and thereafter received for that year shall be paid into the general fund, and unless on or before six months from the time of determination of the budget at least 60% shall have been received, he shall return to the respective associations the contributions from them received.

Articles VI-XI—Meetings, Elections, Committees, Ethics, and Amendments.

Article XII—Referendum. Immediately upon the adoption hereof at a meeting of this association, and the selection of officers in accordance herewith, the trustees shall determine the budget. If within three months local associations in counties having more than 50% of the population of the state, by resolution, accept membership herein, then this constitution shall be considered substituted for the present constitution; otherwise the present constitution shall remain as written, with the exception that officers of the association and "individual" dues shall be as herein provided.

Through the district vice-presidents and otherwise, the Board of Trustees shall use all possible means to secure affiliation of the principal bar association in each county, which association on accepting membership herein shall thereafter be known as the recognized association, for purposes hereof, in said county. After one association in any particular county shall have accepted membership, no other local association in said county shall be recognized, unless or until such recognized association shall permit its proper proportion of any annual budget to remain delinquent more than thirty days.

A few special observations concerning the constitution:

(a) The Washington constitution does not purport to disfranchise anyone who, at the time of its adoption, was a member of the state association. It does provide, however, that after a county association has accepted membership in the state association, no one from that county can be accepted into the state association except through his local or county association. The dues of so-called "Individual Members" are so adjusted or raised that there is a substantial inducement held out to a member to join his local or county association.

(b) It is believed that apportionment on population basis results in each county association having an inducement to build up its own membership. Such has proved the experience in Washington. County associations take no little pride in raising their proportion of the budget, much as was our experience during the war with raising budgets for the Red Cross and other like activities.

Since the adoption of the affiliated plan, the state association receives fully three times the funds it could procure under the old plan, and a local or county association would no more permit, and could no more afford to permit, its membership to lapse, than would or could a local lodge or branch of any of the great fraternal orders permit itself to be severed from state, district or national membership.

(c) It will be seen that so-called "district vice-presidents", who also constitute the board of trustees, are apportioned on a Congressional District basis. In Washington this results in five trustees. It is believed that a state subdivision should be made in such manner that so-called vice-presidents or trustees will not exceed in number, say seven or nine.

(d) It will be seen that no provision is made for "delegates". This was done advisedly. It was thought that that matter could be determined at a later time. In the five years during which the constitution has been in force, no situation has arisen which seemed in the least to demand the selection of delegates. The Washington constitution, however, provides that no one is eligible to be elected president at a meeting held in a city of which he is a resident.

Second: Next, as to how the plan may be adopted: In Washington, in 1920, the membership of the state association had dropped to about 200—scarcely 10% of the membership of the bar of the state. The association was several hundred dollars in debt, and for want of funds had been unable to publish its annual proceedings for three years past. In that year, a short time before the annual meeting, the president appointed a committee on organization. It was the duty of this committee to collaborate with the standing membership committee. The two committees brought in a joint report, including a constitution which it recommended be adopted, and which was done.

Volunteers were immediately called for who would undertake to influence their respective local or county associations to accept membership in the state association. These volunteers, as well as the so-called "district vice-presidents", did their work promptly and well. Simultaneously and in every district the matter was presented to the local or county associations, and almost invariably the necessary resolution procured. Blank forms for county organization were prepared and circulated in counties in which no local organization existed. Through arrangement with some member of the local bar of such counties, a meeting of the lawyers was had and a county association formed. So thoroughly was the work done that, to illustrate, in one sparsely settled county in which there were only three members of the bar, a "county association" was formed and the three became members thereof. Through the "vice-presidents" and volunteers, aided and guided by a helpful and intelligent secretary of the state association, the thing noiselessly and quickly seemed almost to take care of itself, to the end that long before the time provided by its terms the new constitution had supplanted the old and the "affiliation plan" was adopted.

Third: Lastly, as to Washington's experience with the "affiliation plan".

Lawyers prefer to have the authorities cited:

Hon. Mark F. Gose, former Chief Justice of the Supreme Court of Washington, and a former president of the Washington State Bar Association, speaking on the subject in August, 1923, said:

> The merit of the plan is too obvious to require extended argument. "In union there is strength." Upon the adoption of the affiliation plan, the membership in our association (Washington) at once increased from less than two hundred members to fourteen

hundred members. As applied to the American Bar Association, it would add to its strength, hence to its usefulness. It would quadruple its membership. The American Bar Association particularly needs to reach the younger members of the bar, and they need the inspiration which they will get from membership in that association. The affiliation plan would put behind the American Bar Association practically the entire influence and power of the American Bar, young and old, in good standing. This would obviously give it a tremendous influence for good, not only to the country, but to the American Bar as well.

The best evidence of a man's reputation is his appraisement by home folks, hence membership in a local association is the best evidence of fitness for membership in State and National associations.

I have heard no voice raised against the plan since its adoption.

It will be observed that the affiliation plan of membership follows the American plan of citizenship.

A child born in the United States is a citizen of the domicile of the parents, a citizen of the State and of the United States. The plan is simple, natural and workable. It flows from the tap roots to give strength to the top, rather than running from top to bottom.

Hon. R. E. L. Saner, President of the American Bar Association in 1924 in a masterly and comprehensive article in the April 1924 number of the AMERICAN BAR ASSOCIATION JOURNAL, said:

> The State of Washington has afforded a brilliant example of what enterprise and imagination can accomplish by somewhat different methods, in the remarkable success of its affiliation plan. By means of it the local bar associations have all been brought into organic connection with the State organization, and the membership of the latter has thus been raised to 1,800 or 86 per cent of the total membership of the profession of the state. It thus furnishes the example of the best organized State Bar in the country, if we except those states in which the legislature has approved the Bar integration plan.
>
> As to plans for the increase of state bar association membership, both the experience of the state medical associations and that of the Washington State Bar Association, with its affiliation plan, furnish safe guides. Local associations should be formed in areas large enough to support such organizations, where none exist. These should be component parts of the state bar organization system, membership in the local association carrying membership in the state organization. Existing local associations should be persuaded to approve the arrangement. Present methods of encouraging local organizations have not been entirely successful in many states, if we judge from the reports of various officers. In others, they have, of course, been fairly successful, but the connection which they create falls short of any effective organic union.

Again writing under date of May 1st, 1924, President Saner said:

> If the matter of federation could be brought about in the right way it would no doubt be the biggest thing that has ever happened for the legal profession.

Space will not permit the detailing of benefits. Indebtedness was quickly cleared, both proceedings published and the state association has had sufficient funds in its treasury for its purposes. But much as the state association may have benefited, the local associations benefited even more. Regular weekly noonday luncheon meetings are held in the larger cities. Visitors from other local or county associations are frequently present, as well as guests from other states. At these meetings recent decisions of importance are reported and pending or prospective legislation analyzed and discussed. Facilities are also thereby provided by which Supreme Court judges and persons desiring to carry a special message to the members of the bar may, by covering a sort of circuit ,at these meetings thereby procure the attention quickly and easily of substantially the entire membership of the bar of the state.

Spokane, Washington, June 5, 1926.

REVIEW OF RECENT SUPREME COURT DECISIONS

(*Continued from page 452*)

> of the State, and although the decree is based only on payments to agents it does not declare that the payments thus made prevented the payment of appropriate commissions to the agents in the State nor does the statute limit its prohibition in that way.

While the appeal was pending, the legislature of New Mexico repealed the section here involved. The majority of the Court, adverting to a state constitutional provision providing that no act of the legislature should affect any right or remedy in any pending case, gave its opinion that the State Courts might hold that even under the new Act the plaintiff company could be deprived of its license, and decided the case on its merits. But Mr. Justice McReynolds, with whom concurred Mr. Justice Brandeis and Mr. Justice Sanford, delivered a short separate opinion, in which he said:

> The bill questions the validity of a statute which was repealed in 1925. There is no effective remedy which this or any other court can now grant under its allegations and prayers. The cause has become moot and should be treated accordingly.

Argued by Mr. Charles Markell for appellant and by Mr. Milton J. Helmick for appellees.

Bankruptcy

The Circuit Court of Appeals may review as to law and fact the action of District Courts in controversies which present separate issues, by intervention or otherwise, between third persons and the trustee in bankruptcy as to the bankrupt estate. Matters which involve merely the steps to be taken in the ordinary administration of the bankrupt estate are reviewable only as to the points of law involved.

An adjudication of bankruptcy does not bring about the "civil death" of the bankrupt, and his wife does not take the widow's portion, but the adjudication and subsequent appointment of a trustee in bankruptcy is equivalent to a "judicial sale" of his property, and in Indiana the wife becomes vested with the interest in such case provided by the Indiana Judicial Sales Act.

Taylor et al. v. Voss, Adv. Ops. 509, Sup. Ct. Rep., v. 46, p. 461, 7 Am. B. R. N. S. 706.

Voss was the trustee in bankruptcy of a married man resident in Indiana. Before any of the bankrupt's property had been sold, his wife died, leaving all her property to Taylor as trustee. There ensued a controversy between Taylor and Voss, the testamentary trustee and the trustee in bankruptcy, the former claiming and the latter denying that upon the adjudication in bankruptcy the bankrupt's wife had become absolutely vested with a wife's interest in the real estate of her husband to which she would be entitled at the time of her

death. The real estate having been sold in the meantime, the referee held that the testamentary trustee was entitled to one-fifth of the sum received at the sale. This order was affirmed by the District Court. The trustee in bankruptcy filed a petition, under Secton 24-b of the Bankruptcy Act, for a revision of this order in matters of law. The testamentary trustee objected to this procedure as well as to the merits of the petitioner's case. The Circuit Court of Appeals for the Seventh Circuit proceeded to consider both law and fact as though the case had been brought up on appeal, concluded that no interest had passed to the testamentary trustee, and accordingly reversed the District Court. The Supreme Court granted a writ of certiorari. Upon argument before that Court the testamentary trustee made two contentions, first, that the Court of Appeals had no jurisdiction to review the order of the District Court under the petition for revision; and, second, that assuming such jurisdiction existed, the decree of reversal was erroneous as a matter of law. The Supreme Court held that the law of the case was properly reviewable upon petition, but concluded that the adjudication in bankruptcy followed by the appointment of the trustee made absolute the wife's interest in the bankrupt's property. The decree was therefore reversed and the cause remanded.

Mr. Justice Sanford delivered the opinion of the Court. The procedural question involved an interpretation of Sections 24-a and 24-b of the Bankruptcy Act. Section 24-a gives the Circuit Courts of Appeals appellate jurisdiction of "controversies arising in bankruptcy proceedings," while Section 24-b gives them jurisdiction to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy." A series of previous decisions had interpreted these sections:

> It is now settled by the decisions of this Court, that the "controversies arising in bankruptcy proceedings" referred to in Section 24-a, include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise, distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate. (Citing cases.) In such "controversies" the decrees of the court of bankruptcy may be reviewed by appeals which bring up the whole matter and open both the facts and the law for consideration. (Citing cases.)
>
> On the other hand, the "proceedings" in bankruptcy referred to in Section 24-b are those matters of an administrative character, including questions between the bankrupt and his creditors, which are presented in the ordinary course of the administration of the bankrupt's estate. (Citing case.) In such administrative matters—as to which the courts of bankruptcy proceed in a summary way in the final settlement and distribution of the estate (Citing case),—their orders and decrees may be reviewed by petitions for revision which bring up questions of law only.

Applying these principles to the present facts, learned Justice held: (1) that the present question was a "controversy" reviewable by appeal under Section 24-a; (2) that the general provision of the Jurisdictional Act providing that appellate courts should not dismiss a writ of error when an appeal should have been brought could not be extended to the special provisions of the Bankruptcy Act; and that in a case such as this where the facts were not in dispute the questions of law could be reviewed by a petition for revision under Section 24-b. With respect to this last point the decisions in the Courts of Appeals were in conflict. A large part of the opinion of the learned Justice is devoted to an examination of those decisions of the Supreme Court most nearly relevant. Following this examination, he concluded:

> In a "controversy" arising in a bankruptcy proceeding, it is not essential to a review, when the facts are undisputed or no longer questioned, that resort should be had to an appeal under Section 24-a; but that in such case the controlling questions of law may also be reviewed by a petition for revision under Section 24-b, whether they relate merely to the jurisdiction of the bankruptcy court or to the merits of the controversy. Such a review, however, by petition for revision, is a concurrent remedy merely, and in conformity with the decision in the *Loving* case, cannot, irrespective of any other limitation, be deemed an "additional remedy" which may be resorted to after the time for an appeal has expired. This construction of the Act is, we think, consistent with its letter; accords with its spirit and manifest purpose; and gives it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities.

The contention of the testamentary trustee upon the merits was based upon two arguments. The first of these was not successful:

> The first contention is based upon the Indiana statute of descent, which provides that: "If a husband die . . . leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: *Provided, however,* That where the real estate exceeds in value ten thousand dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors." . . . This contention lacks any substantial basis. The statute creates no estate in the wife during her husband's lifetime, but merely an inchoate and contingent interest, which depends upon her survivorship and is extinguished if she dies before him. (Citing cases.) The argument that the adjudication of a husband as a bankrupt brings about his "civil death," so that his wife is to be regarded as a "widow" within the meaning of the statute, vested by virtue of the adjudication with the interest in his real estate which would have descended to her if she had survived him, is inconsistent with the provisions of the Bankruptcy Act, the language of the Indiana statute, and the decisions of the courts of the State; and the contention was rightly denied by the Circuit Court of Appeals.

The second argument was that the Indiana Judicial Sales Act applied to the present situation, vesting an interest in the bankrupt's wife, in that the appointment of a trustee in bankruptcy amounted to a judicial sale. Indiana decisions, relative to an earlier Bankruptcy Act, had held that a conveyance made by a judge to an assignee in bankruptcy of the bankrupt's estate amounted to a judicial sale. The learned Justice concluded that appointment of a trustee under the present act likewise amounted to a judicial sale. He said:

> We see no substantial distinction, so far as the reasoning of the Indiana courts is concerned, between the cases arising under the Bankruptcy Act of 1867 and under the present Bankruptcy Act, since under both Acts the transfer of title to the bankrupt's property is based, in its last analysis, upon the adjudication in bankruptcy, that is, rests upon the judgment of the bankruptcy court, carried into effect in the one case by a conveyance to the assignee, and in the other by transfer to the trustee by operation of the law.
>
> In the absence of any conflicting provision in the Bankruptcy Act the question of a wife's interest in the bankrupt's property is governed by the local law. (Citing case.) And, following the construction placed upon the Indiana statute by the courts of that State, we conclude that the adjudication of Erskine as a bankrupt, when followed by the appointment of the trustee in bankruptcy, operated as a "judicial sale" of his real estate within the meaning of the statute, and made absolute his wife's interest therein.

Argued by Mr. Daniel H. Ortmeyer for petitioners and by Mr. Henry B. Walker for respondent.

FINAL PROGRAM FOR THE DENVER MEETING

Wednesday, July 14, at 10 A. M.

Denver Auditorium

Addresses of Welcome.

Annual Address by President of the Association.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Nomination and Election of Members.

(State delegations will meet at the close of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.)

Wednesday, July 14, at 2:30 P. M.

Denver Auditorium

This session will be a joint session of the American Bar Association and the Colorado State Bar Association.

Address by Henry A. Dubbs of Colorado: "The Unfolding of Law in the Mountain Region."

Symposium—Enforcement of the Criminal Law:

Guy A. Thompson, St. Louis, Mo., "The Missouri Crime Survey."

William E. Dever, Mayor of Chicago, "Law and Order in American Municipalities."

Wednesday, July 14, at 8 P. M.

Denver Auditorium

Address by Hon. James M. Beck, "The Future of Democratic Institutions."

Election of General Council.

9:30 P. M. President's Reception—Cosmopolitan Hotel.

Thursday Morning, July 15

A. M. *Broadway Theatre*

10:00 Statement of progress of work of the American Law Institute, by the President, George W. Wickersham.

Reports of Sections and Committees

(The names of the respective chairmen are given.)

Sections

10:20 Criminal Law, Oscar Hallam, St. Paul, Minn.

10:30 Comparative Law Bureau. William M. Smithers, Philadelphia, Pa.

10:40 Judicial Section. James I. Allread, Columbus, Ohio.

10:50 Legal Education. Silas H. Strawn, Chicago, Ill.

11:00 Patent, Trade-Mark and Copyright Law. Arthur C. Frazer, New York, N. Y.

11:10 National Conference of Commissioners on Uniform State Laws. George B. Young, Montpelier, Vt.

11:20 Public Utility Law. William Chamberlain, Cedar Rapids, Iowa.

11:30 Conference of Bar Association Delegates. Josiah Marvel, Wilmington, Del.

Committees

11:40 Professional Ethics and Grievances. Thomas Francis Howe, Chicago, Ill.

11:50 Use of the Word "Attorney." William H. Lamar, Washington, D. C.

P. M.

12:00 Supplements to Canons of Professional Ethics. Charles A. Boston, New York.

12:10 Commerce, Trade and Commercial Law. Province M. Pogue, Cincinnati, Ohio.

12:20 Practice in Bankruptcy Matters. Simon Fleischmann, Buffalo, N. Y.

12:30 Publicity, Walter H. Eckert, Chicago, Ill.

12:40 Publications. Grenville Clark, New York.

12:50 Membership. Frederick E. Wadhams, Albany, N. Y.

1:00 Adjournment.

Thursday Afternoon, July 15

Broadway Theatre

Committee Reports

(The names of the respective Chairmen are given.)

P.M.

2:00 American Citizenship. F. Dumont Smith, Hutchinson, Kans.

2:15 International Law. James Brown Scott, Washington, D. C.

2:25 Law Enforcement. Charles S. Whitman, New York City.

2:35 Removal of Government Liens on Real Estate. John T. Richards, Chicago, Ill.

2:45 Jurisprudence and Law Reform. Henry W. Taft, New York City.

3:00 Federal Taxation. Charles Henry Butler, Washington, D. C.

3:15 Salaries of Federal Judges. A. B. Andrews, Raleigh, N. C.

3:30 Symposium—Greater Efficiency in Judicial Procedure.

1. Robert G. Dodge of Boston, Mass. "Judicial Council."
2. Edson R. Sunderland of Ann Arbor, Mich. "Exercise of the Rule Making Power."
3. Roscoe Pound, Cambridge, Mass. "The Canons of Procedural Reform."

5:00 Memorials. William P. MacCracken, Jr., Chicago, Ill.

Thursday, July 15, at 8 P. M.

Denver Auditorium

Address by Thomas J. Norton of Chicago, Ill. "National Encroachments and State Aggressions."

Address by Duncan Campbell Lee of London, England. "Recent Changes in English Law of Property."

Friday Morning, July 16

Broadway Theatre

Committee Reports

(The names of the respective Chairmen are given.)

A. M.

10:00 Revision of Federal Statutes. Paul H. Gaither, Greensburg, Pa.

10:20 Uniform Judicial Procedure. Thomas W. Shelton, Norfolk, Va.

10:30 Noteworthy Changes in Statute Law. Joseph P. Chamberlain, New York City.

10:40 Admiralty and Maritime Law. Charles C. Burlingham, New York City.

10:50 Change of Date of Presidential Inauguration. Levi Cooke, Washington, D. C.
11:00 Legal Aid. Reginald Heber Smith, Boston, Mass.
11:20 Law of Aeronautics. William P. MacCracken, Jr., Chicago, Ill.
11:30 Incorporation of American Bar Association. John B. Corliss, Detroit, Mich.
11:40 Insurance Law. William Brosmith, Hartford, Conn.
12:00 Nomination and Election of Officers.
Miscellaneous Business.
Adjournment *sine die*.

Friday Afternoon, July 16, at 2 P. M.

Motor trips to:

(1) Mountain Park Circle Trip, with stops at Motor Club and Buffalo Bill's grave.

(2) Sightseeing trip around city; tea at Fitzsimons' Military Hospital as guests of Colonel and Mrs. Hutton.

Friday Evening, July 16, at 7 P. M.

Annual Dinner of members of the Association —Denver Auditorium. Speakers to be announced later.

Ladies' Dinner—A dinner will be tendered by the Colorado and Denver Bar Associations to the ladies accompanying members and guests, in Hall of Colorado, Cosmopolitan Hotel, at 6:30 P. M., Friday, July 16th.

Saturday, July 17.

Motor Tours to:

(1) All-day trip to Estes Park; luncheon at Stanley Hotel.

(2) All-day trip around "The Mining Circle," luncheon at Hotel Springs Hotel, Idaho Springs.

(3) All-day trip to Colorado Springs, Garden of the Gods and Manitou; luncheon at Broadmoor.

(4) All-day trip over Mt. Evans Highway to Echo Lake.

(5) Two-day trip "Grand Lake Circle"; luncheon at summit of Berthoud Pass; dinner, night and breakfast at Grand Lake; luncheon, Sunday, Stanley Hotel, Estes Park.

(6) All-day trip via Moffat Railroad to Corona Pass.

Conference of Bar Association Delegates
Eleventh Annual Meeting, Denver, Tuesday, July 13, 1926

Forenoon Session—10:00 A. M.

Opening Address: Vice-Chairman, Josiah Marvel.

Reports of Committees:
- Conciliation and Small Claims Procedure: Reginald Heber Smith, Chairman.
- Co-operation Between the Press and the Bar: Julius Henry Cohen, Chairman.
- Requirements for Admission: Walter F. Dodd, Chairman.
- State Bar Organization: Clarence N. Goodwin, Chairman.
- Judicial Selection: Irvin V. Barth, Chairman.

Reports by Delegates on Bar Association Accomplishments.

Appointment of Nominating Committee.

Afternoon Session—2:00 P. M.

Special Topic: The Judicial Council and the Rule-Making Authority.

Reports of Delegates—Continued.

Miscellaneous New Business.

Section of Criminal Law

The Criminal Law Section will hold two sessions on Tuesday, July 13, in the Ca[illegible] Life Auditorium at 2 P. M. and 8 P. M. [illegible]e following speakers will address the Section:

Oscar Hallam of the St. Paul Bar, Chairman of the Section of Criminal Law, "Movements for Better Law Enforcement to Date."

Charles A. Boston of the New York Bar. "Crime Waves and Their Suppression—Past History," "Informal Presentation of Advantages Which May Be Gained from a Study of the History of Crime Suppression."

Charles C. Butler, President of the Denver Bar Association, "The Administration of Criminal Justice."

Arthur V. Lashly of St. Louis, Operating Director of the Missouri Association for Criminal Justice, "The Missouri Crime Survey."

William Draper Lewis of Philadelphia, Director of the American Law Institute, "Model Code of Criminal Procedure."

Comparative Law Bureau

1 P. M., Tuesday, July 13, Brown-Palace Hotel.

Section of Legal Education and Admission to the Bar

2 P. M., Tuesday, July 13, Ball Room, Shirley Savoy Hotel.

Section of Public Utility Law

The Section convenes at 2:30 P. M. Monday, July 12, in Rainbow Lane, Shirley-Savoy Hotel

Monday, July 12, 2:30 P. M.

Address: William Chamberlain, Iowa, Chairman.

Report of Secretary.

Appointment of Committees.

Address: N. T. Guernsey, New York, Vice-President, American Telephone and Telegraph Company, "Should the Amount of What Is Frequently Called the Depreciation Reserve Be Deducted in Arriving at Value?"

Address: Ray N. Van Doren, Illinois, Vice-President and General Counsel, Chicago & Northwestern Railway Company, "Regulation of Railroads in Relation to Economic Law."

Tuesday, July 13, 10:00 A. M.

Address: Frank Milhollan, North Dakota, President, Board of Railroad Commissioners, "Some Utility Problems from a Legal Standpoint."

Address: Lovick P. Miles, Tennessee, "Rate Making Value Should Never Be Less Than the Prudent Investment."

Address: Oliver E. Sweet, Washington, D. C., Assistant Solicitor, Interstate Commerce Commission, "Valuation of Railroads and Utilities."

Address: John P. Finerty, Washington, D. C., "Discussion of Railroad Valuation."

Tuesday, July 13, 7:00 P. M.

Informal Dinner of Members—Denver Club.

General Round-Table Discussion (topics and names to be announced).

Miscellaneous business.

Adjournment.

Judicial Section

Afternoon Session, 2 o'clock, Tuesday, July 13

Supreme Court, Capitol Building

Address of welcome, Hon. George W. Allen, Chief Justice, Supreme Court of Colorado.

Response, Hon. Robert R. Prentis, Judge Supreme Court of Virginia.

Address, Dean Roscoe Pound, Harvard Law School. (Subject to be announced.)

Address, Hon. John S. Dawson, Justice Supreme Court of Kansas, "Rationale of Appellate Procedure."

Address, Hon. Haslett P. Burke, Judge Supreme Court of Colorado. (Subject to be announced.)

The Annual Dinner of the Judicial Section will be held in the Palm Room, Brown-Palace Hotel, Wednesday, July 14th, at 7 o'clock p. m. Speakers and subjects will be announced later.

Section of Patent, Trade-Mark and Copyright Law
Tuesday, July 13th

Business sessions at 10 a. m. and 2:30 p. m., Drawing Room, Brown-Palace Hotel. The Chairman will report progress made during the year, followed by reports of the committees on

Legislation: A. C. Paul, Chairman, concerning bills pending in Congress.

Copyright Legislation: E. S. Rogers, Chairman, concerning General Copyright Bill H. R. 10434 and international copyright.

Design Copyright: L. D. Underwood, Chairman, concerning H. R. 6249.

Patent Law Revision: C. H. Howson, Chairman, concerning proposed further amendments of the patent statutes with the recommended bill submitted for discussion.

Luncheon for members of the section at 1 p. m. (Place to be announced.)

Dinner for members, ladies and guests, 7 p. m., Palm Room, Brown-Palace Hotel.

National Association of Attorneys General

Cosmopolitan Hotel, Denver, Colorado

Monday and Tuesday, July 12 and 13, 1926, 10 A. M. and 2:30 P. M.

Address of Welcome: Hon. C. J. Morley, Governor of Colorado.

Address of President: Hon. George M. Napier, Attorney General of Georgia.

Address: Hon. Herman L. Ekern, Attorney General of Wisconsin, "Inheritance Taxes".

Address: Hon. Harvey H. Cluff, Attorney General of Utah, "Fair and Unfair Competition".

Address: Hon. O. S. Spillman, Attorney General of Nebraska, "The Gasoline Situation".

Address: Hon. Ben J. Gibson, Attorney General of Iowa, "A State Bureau of Investigation".

Address: Hon. North T. Gentry, of Missouri, "Cooperation between Federal and State Officials".

Address: "Pardon and Parole Systems" (Speaker to be announced later.)

Election of Officers.

International Association of Attorneys General

Cosmopolitan Hotel, Denver, Colorado

Tuesday, July 13, 1926, 10:00 A. M.

Tentative Program

Address of Welcome: Hon. William L. Boatright, Attorney General of Colorado.

Address of President: Hon. Clifford L. Hilton, Attorney General of Minnesota.

Address: Hon. Jay R. Benton, Attorney General of Massachusetts, "International Extradition".

Address: "Law Enforcement and Criminal Procedure", followed by round table discussion,—Hon. Oscar E. Carlstrom, Attorney General of Illinois and an Attorney General of a Canadian Province.

Election of Officers.

Luncheons

Bar Association Secretaries: University Club, Tuesday, July 13th, 1 o'clock P. M. (William P. MacCracken, Jr., Headquarters, Cosmopolitan Hotel, in charge of arrangements.)

Chicago University Law School Alumni: Brown-Palace Hotel (Room 2) Thursday, July 15th, 1 P. M. (For reservations apply Secretary's headquarters, Cosmopolitan.)

Columbia University Law School Alumni: Thursday, July 15, 1 P. M. Shirley-Savoy Hotel.

Harvard Law School Alumni: Brown-Palace Hotel (Palm Room), Thursday, July 15th, 1 P. M. The guests at the luncheon will be Hon. James M. Beck, Dean Roscoe Pound and Professor Samuel Williston. For reservations apply to E. Ward Bannister, 801 Equitable Bldg., Denver.

Michigan University Law School Alumni: University Club, Thursday, July 15th, 1 P. M. For reservations apply to Merrick K. Edwards, 541 Equitable Bldg., Denver.

Yale Law School Alumni: Brown-Palace Hotel, Thursday, July 15th, 1 P. M. (For reservations apply Secretary's headquarters.)

Dinners

Delta Theta Phi: Cosmopolitan Hotel, Wednesday, July 14th, 7 P. M.

Special Announcements

Annual Dinner

The annual dinner of the Association will be given at the Denver Auditorium, Denver, on Friday night, July 16th, at 7:00 o'clock.

Hon. Chester I. Long, President of the Association, will preside.

A charge of five dollars for dinner tickets will be made to members and delegates. A limited number of tickets for guests (non-members of the Association) will be furnished to members, space permitting, at a charge of seven dollars each.

Tickets for the annual dinner can be procured and arrangements made for table parties on application at the office of the Treasurer, at the headquarters of the Association in the Cosmopolitan Hotel, where representatives of the Dinner Committee will be in attendance from 9:00 A. M. to 6:00 P. M. on Monday, Tuesday and Wednesday, July 12th-14th, and on Thursday, July 15th, until noon (the day *before* the annual dinner.)

Arrangements for table parties cannot be made *after one o'clock Thursday afternoon, July 15th.*

Printed seating lists, alphabetically arranged, of members in attendance at the dinner will be provided, showing the number of the table assigned to each person, and therefore the closing on Thursday noon of the subscription books for the dinner on Friday night is necessary in order to permit the preparation and printing of these seating lists.

Ladies' Dinner

The Colorado and Denver Bar Associations will tender a dinner to the ladies accompanying members and guests, which will take place at 6:30 P. M. Friday, July 16th, in the Hall of Colorado, Cosmopolitan Hotel. Tickets can be obtained at the headquarters of the Colorado Committee, Lounge, Mezzanine Floor, Cosmopolitan Hotel, *up to six o'clock P. M. Thursday, July 15th.*

The Post-Convention Trip to Yellowstone and Glacier Parks

A trip through Yellowstone and Glacier Parks has been arranged to follow the meeting in Denver, and quite a number of the members of the Association have made definite plans to go. Some members of the party will go only as far as Yellowstone, while others will go on to Glacier Park. To make the trip through both Parks will require about two weeks, and the approximate expense from Denver to Chicago will be $190.00 per person, exclusive of return railroad fare. The trip to Yellowstone only requires about ten days from the time of departing from Denver until one reaches Chicago, and the cost per person from Denver will be approximately $123.00.

The party will leave Denver Sunday night, July 18th, and going by Colorado Springs, Glenwood Springs, and Salt Lake City, with stop-overs for sight-seeing at all points, will reach Yellowstone on July 22nd, where five days will be spent.

The members of the party going on to Glacier will leave Cody, Wyoming, on July 26th, reaching Glacier Park the next day, where a tour of four days through the Park will be taken.

Members who have not made arrangements to take this trip, before leaving for Denver, can do so by making application to the Secretary's office, Headquarters, Cosmopolitan Hotel, *not later than Thursday, July 15th.*

BAR ADMISSION SYSTEMS OF CANADA AND U. S.*

BY ALFRED Z. REED

DURING the autumn of 1924 the writer took a trip through Canada, primarily for the purpose of collecting material for the Bulletin now passing through the press. Pending the appearance of this, readers on both sides of the international boundary may be interested in a general comparison between the bar admission systems of Canada and of the United States.

One of the most obvious differences between the two countries appears in the organization of the admitting authority. In Canada, to a much greater extent than in the United States, the organized legal profession participates in the making of rules and in the conduct of examinations. The extent of the control which Canadian Law Societies actually exercise over the admission of lawyers into practice must not, however, be exaggerated. As in the United States, at least the main lines of the requirements are usually laid down by the legislatures; and in Ontario and the prairie provinces the law schools have gone much further than in any American state in securing administrative control of the examinations. In this respect, the real contrast between the two countries is not that Canadian practitioners have somewhat greater influence over the process of admission, but that Canadian judges have much less. The ceremonial "call to the bar" lingers as a traditional survival, but there is not a trace of the all but universal American system of judicial rules affecting admission to the bar, and examination of applicants by the judges or by boards appointed by them.

It is significant in this connection that for some years there has been a movement, fostered by the American Judicature Society and by the Conference of Bar Association Delegates of the American Bar Association, to establish in the several states of the Union inclusive "self-governing" associations of lawyers, modeled in a general way upon the incorporated Canadian Law Societies. Up to the present time four states—North Dakota, Alabama, Idaho, and New Mexico—have enacted the requisite legislation. The four enactments differ from one another in detail, but in one way or another all preserve the characteristic American principle that the courts should as a matter of policy, if not of law, exercise a certain amount of control over the admission of lawyers into practice.

A difference of more serious moment is the greater severity of the Canadian requirements. The applicant must pay higher fees; he must usually undergo a more complex system of examinations; above all, he is required to devote more time to his preparation than in the United States. Inspection of the information printed on succeeding pages will reveal the fact that in only three American jurisdictions—Kansas, West Virginia, and Illinois—is the minimum interval between leaving the high school and admission to practice (the sum, that is to say, of the preliminary college years and the years devoted to technical law) now, or soon to be, so long as five years; and in only two more—New York and Colorado—is the corresponding figure four years. Four out of nine Canadian provinces

*From the Twentieth Annual Report of the Carnegie Foundation for the Advancement of Teaching. The author is Mr. Alfred Z. Reed, whose report on the Profession of the Law in this country appeared several years ago under the auspices of the Carnegie Foundation and was at once recognized as a notable contribution to the subject.

require as many as five years, and four others require no less than six years after leaving the high school. In the Province of New Brunswick and in Newfoundland the requirements are slightly lower, because less is demanded in the way of general education, yet even here these general qualifications, such as they are, must be satisfied before the period of law study begins. There is no Canadian counterpart for the fifteen states where the applicant can secure the requisite amount of general education, so-called, by intensive preparation pursued at the same time that he is studying law. Still less can a Canadian lawyer understand how there can be seventeen American jurisdictions which require no specific amount of general education; or how, among these, there can be seven which do not require even a period of law study.

There is a marked contrast also in the type or location of law study that will be accepted. In the United States, the rules, even when they define the period of study, are often very vague in regard to its character. Sometimes they require merely study under the general supervision of a lawyer, or "under proper direction"; under this system almost any sort of preparation can be offered. The prevailing rule is a trifle more stringent in that it limits the applicant to study either in a law school or in a law office, or partly in one and partly in the other, in such proportions as he may himself decide. The few states that go into greater detail are actuated by conflicting ideas. Some—as, for instance, New Jersey, and for most applicants New York—insist that the applicant during his period of preparation shall spend at least a certain specified amount of time in a law office, with the privilege of spending his entire period there if he so desire. Others—as, for instance, Illinois—discourage office work by lengthening the period of preparation in the case of students who do not secure their entire preparation in a law school; West Virginia has gone so far as to announce that it will refuse credit for any training secured in a law office.

On the other hand, all the Canadian provinces agree that the ideal preparation would consist of a suitable combination of school and office work. For this reason, in every province the student must include in his preparation a certain amount of office training. But also in every province except Prince Edward Island the successful completion of a three-year law school course is either likewise obligatory, or is encouraged by a provision that in such cases the total period of preparation may be reduced. It is true that east of the prairie provinces, as in the United States, there are not wanting those who doubt whether the modern law office and the law student have much to offer one another. This attitude finds no reflection, however, in the actual bar admission rules. The question that now particularly agitates those responsible for the development of these rules is not whether law school and law office work ought to be combined, but how this can be done most effectively: by having the student divide each working day between school and office; or by interpolating the office work into the long summer vacations of the school; or by postponing the office service until after the law school course is completed.

Other significant differences are the division of the legal profession, in the Province of Quebec, into the two mutually exclusive groups of Notaries and of Advocates (or the "Bar"); the operation of law schools by the legal profession itself in Ontario and British Columbia, and by the legal profession jointly with the provincial university in Manitoba; the far greater readiness of Canadian professional authorities to shorten the required period of law study in the case of college graduates; and the greater extent and more varied forms of co-operation between practitioners and university law faculties in the conduct of examinations. Of less practical importance, though of considerable interest to the student of legal education, are the technical survivals found in some of the printed rules, such as the occasional appearance of the original title of "attorney" (universally preserved in the United States) in place of the modern English "solicitor"; the circumstance that in Prince Edward Island, as in Delaware, "solicitor" is still in its earlier sense of practitioner in the Court of Chancery; the reference in several provinces to "the degree" of barrister-at-law. In spite of these survivals, one and the same person may everywhere, except in the Province of Quebec, enjoy all the privileges of legal practice; the integrated title of "barrister and solicitor" is in common usage, and corresponds closely to the American "attorney and counselor."

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830 First National Bank Bldg.

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PRESENT SITUATION AS TO UNIFORM PROCEDURE BILL

By Thomas W. Shelton
Chairman Committee on Uniform Judicial Procedure

The Bench and Bar are familiar with and have actively participated in the campaign that has been aggressively conducted before Congress for the past twelve years in the effort to bring about the enactment of the bill (S. 477; H. R. 419) vesting in the United States Supreme Court the power to make rules on the law side of the courts, to the end that the detail machinery of the courts may be made simple and scientific and free from statutory rigidity and legislative interference. It is the same power exactly already exercised on the equity side and in admiralty and bankruptcy. Through the aid of the several State Vice-Presidents, eighty-two Senators and over eighty-five per cent of the House signed favorable questionnaires after having the matter explained to such as were not already conversant with it. But the Judiciary Committee held the bill in committee. That is now and has always been the sole difficulty. In 1916 it was favorably reported under the guidance of Senator, now Mr. Justice George Sutherland, just before the session adjourned. In 1924 an unfavorable report was made likewise too late for action. The favorable report just made will hardly prove an exception.

The Present Session—A Favorable Report

At the opening of the present session in December, 1925, the bill was again introduced by Senator Albert B. Cummins and Representative A. J. Montague, respectively in the Senate and House, and was referred to the respective Judiciary Committees. Unavailing efforts were made to induce the Senate Committee to report until May 17th, when it appears to be again too late to call up the Bill in the Senate for a vote before adjournment. But this time it stands ready for a vote at the short session in December, which is a distinct gain.

As to the cause of the delay, certain correspondence will be quoted.

The Cause of the Delay

On May 7th Chairman Shelton, having much respect for the great Western Senator, made a personal appeal to Senator Thomas J. Walsh to allow a vote. The Senator answered on the 10th that, "I appreciate that you have held me responsible for the delay in the Committee on this bill, though I protest the blame is justly chargeable to members of the Committee who . . . have remained away from the meetings at which it has been considered. . . ."

In a letter to Judge Charles B. Letton, of Nebraska, dated May 27th, Senator Walsh said: "I have simply asked that a vote on the bill be deferred until I could present the arguments against it to them. That they failed week after week to attend the sessions of the Committee was no fault of mine. This condition continued during the present Session until I finally abandoned my attitude and the bill is now before the Senate with a favorable report signed by members who never heard the discussion before the Committee, or at least heard it only in a fragmentary way." It is manifest that these Senators, having familiarized themselves with the bill and being in favor of it, were devoting their attention to other matters. Moreover, on account of conflicting committee engagements, it is reasonably doubtful if a full membership were ever present.

Aid of the Vice-Presidents

The Committee on Uniform Judicial Procedure, while having a member constantly in Washington, is pleased to attribute the present success much to the prompt and militant aid of the several State Vice-Presidents. They have elevated their honorable office to one of great utility and deserve the gratitude of the Association that is becoming an aggressive force in bringing justice to the people with promptness, simplicity and economy. They and the State Committees are now asking their respective Senators to call up the bill before adjournment, *otherwise to arrange for a vote promptly at the beginning of the short session in December.* That is the vital element in the campaign. In this event it can almost certainly be put through the House before adjournment. Every lawyer and judge should send now and at the beginning of the December session a letter of support to his Senators and Representatives, referring them to page 483 of the 1924 Annual Report of the American Bar Association, and urge a vote. Surely there has been enough precious time consumed in seeking an audience in the committee.

Recent History

Senator Thomas J. Walsh delivered an address in opposition to the Bill at the recent Texarkana Tri-State Bar meeting held in April with which the Bar are familiar. Previously he had replied to an editorial criticism in the New York Times conceding his responsibility for the delay to which a response was made by Chairman Shelton. The three articles were published in pamphlet form and were distributed.

Obviously the lawyers have no quarrel with Senator Walsh, because of his adverse personal convictions. But they are equally convinced that he owes something also in his *representative* capacity. The lawyers entertain a high regard and a respectful admiration for the undaunted courage and almost unmeasured influence of the great Western Senator. However, the lawyers of America, putting to one side the inalienable right of every citizen to be heard, would be unfeignedly grateful for a vote in Congress on the Procedural Bill, after patiently waiting twelve years. Is a Committee, any more than a King, justified in suppressing legislation?

Conciliation Courts for Ohio

I propose to this association that we make a serious effort, as authorized by the Constitution of our state, for the establishment of conciliation courts. To this end I have drafted and attached hereto a proposed act framed along the lines of the model drawn by the American Judicature Society, and most earnestly recommend its consideration and approval. The proposed act provides for the appointment by the Common Pleas Judges of a conciliation board in each county, the number and the location thereof to be determined by the court; that a county judge shall be an ex-officio member of the board; that any person of good reputation and having the qualifications of a voter shall be eligible to appointment as conciliator; but if a member of the bar be appointed, he shall not appear in any action submitted to him as conciliator on behalf of either party. The conciliators shall hold their office at the pleasure of the court and shall take an oath of office; they shall meet upon the call of the judge or a majority of the board; they may grant continuances—may grant a change of venue to some other conciliator, or, if interested in the controversy, they need not be compelled to serve. Every conciliator shall serve without compensation.

The proposed act further provides that the conciliator may request one of the parties to appear before him at a particular hour. If he fails to appear, a certificate of conciliation shall be granted to the complainant. If the person complained of does appear, it is the duty of the conciliator to hear the parties and their witnesses and endeavor to effect an amicable settlement of the controversy agreeable to law and equity. No record of the proceedings shall be made, nor shall it be considered in any subsequent trial of the case or be in any manner referred to therein.

The meat of the proposal is expressed in the idea that no process shall be issued for the commencement of any civil suit by any court unless the moving party shall file in such court a certificate of a conciliator to the effect that an attempt has been made to settle the claim sued for and that such attempt has failed; but this rule shall not apply to suits commenced in attachment or replevin, nor for injunction, nor other remedial rights, nor in any case where any judge of the court in chambers may upon a proper showing direct the issuance of process without recourse to conciliation.

The purpose of the law is at once apparent. The very soul of it may be expressed in the statement that before a person shall involve his neighbors and himself in legal warfare, there shall be made an effort to secure a legal peace. Bear in mind that conciliation does not demand compulsory peace, but does demand a compulsory effort for peace.

Under conciliation, if the parties refuse to adjust their differences through the medium of the court of conciliation, then they are privileged to go to court. If the party summoned fails to appear or fails to agree, no harm has been done; no money has been wasted, but little effort has been expended, and although the effort at peace has failed, it is worth something that the attempt shall have been made.—From address of Hon. John B. Cline before Ohio State Bar Assoc., Jan., 1925.

California

California Judicial Section Meets

(From the San Francisco Recorder, June 20)

The outstanding feature of the sessions of the Judicial Section of the California Bar Association at Los Angeles was the address of Hugh Henry Brown of San Francisco at the night session Friday on "The Administration of Civil Justice."

Mr. Brown's address made a profound impression upon the judges and evoked tumultuous applause. Without any tricks of oratory, but with the compelling logic of the scholar and the student Mr. Brown assembled and presented his facts, establishing in a most convincing manner the deplorable condition existing throughout the country in the administration of civil justice. He suggested as remedies for the existing condition of delay and congestion in California the adoption of the Judicial Council amendment, the giving of the rule-making power to the courts, the establishment of higher standards of legal education and the retirement of judges whose services after retirement might be available for the relief of congestion.

Mr. Justice Curtis of the Supreme Court presided at Saturday morning's session. The creation of a committee was authorized to recommend to the California Bar Association convention at Yosemite in September the appointment of a State Committee on Judicial Selection pursuant to the recommendation of the American Bar Association.

President Charles A. Shurtleff of the California Bar Association, former justice of the Supreme Court, addressed the section on "The Amelioration of the Work of the Justices of the Upper Courts," in which he outlined the onerous duties of the justices of the Supreme Court and their manner of work and stressed the necessity for devising a remedy that would at once relieve the congestion and lighten the labors of the justices. He suggested as one solution of the problem the conferring upon the Chief Justice of power with the concurrence of three Associate Justices of calling into service extra sessions of the Supreme Court made up of judges of the Superior Court, and if necessary, of members of the bar to sit, when and where necessary, to assist the Supreme Court in disposing of its cases. He commended the Judicial Council idea, but declared that it was not sufficiently comprehensive to relieve the congestion. If the courts were permitted to make their own rules of practice and procedure instead of having to be governed by rules made for them by the Legislature, the situation would be immeasurably relieved. He endorsed the proposed constitutional amendment for the retirement of judges and stated that the bar and the judges have a duty to perform in ameliorating the present condition of congestion in the courts and that it is through meetings such as this that remedies suggested may be considered and a solution of the problem reached.

Mr. Presiding Justice William H. Langdon of the District Court of Appeal, First District, Division Two, presented a constructive suggestion for the relief of the congestion in the Supreme Court.

Mr. Chief Justice William H. Waste of the Supreme Court presented a paper on the proposed judicial retirement amendment. After indicating the desirability of the amendment, he pointed out that this was not a new idea but that seventeen states have laws providing for the retirement of judges. The section endorsed the amendment and provided for the appointment of a committee to advocate the approval by the people.

It was declared the sense of the section that the public welfare demands the attendance of the judges at the meetings of the Judicial Section and that calendars should be so arranged as to permit of such attendance.

Mr. Justice John E. Richards of the Supreme Court spoke briefly upon the general subject of congestion and the proposed remedies. Judge Hollzer expressed the gratitude of the Los Angeles judges at the large attendance of outside judges, and the meeting adjourned.

Delaware

Rule-Making Power Lodged in Supreme Court

(From a letter to the Editor)

A particularly striking and gratifying note in Delaware is that last year the State Bar secured the placing of the rule-making power in the Supreme Court, for the civil side of the courts and also placed the control of practice in the Criminal courts in the Supreme Court. This is a striking step forward and, from what I learned, was acepted by the Legislature at the request of the Delaware State Bar, without a single dissenting voice from the Legislators. The position of the Delaware State Bar is somewhat unique in regard to the respect shown to its recommendations by the legislators.

Another striking note is that sounded by its President, Josiah Marvel, in the annual address on January 8, 1926 (printed in the 1925 Year Book of the Delaware State Bar Association), in which he emphasizes the responsibility of the Bench and Bar for the proper development of the Judicial Department of Government.

Georgia

Georgia Votes for Statutory Organization of Bar

The Georgia Bar Association held its annual meeting at Tybee Island, near Savannah, Georgia, on June 3, 4 and 5, 1926. The meeting was well attended by lawyers generally from every section of the State. The increased attendance from the smaller cities and towns and their active particpation was noteworthy.

The annual address was delivered by Mr. Eugene H. Angert of the St. Louis bar. His subject was: "Is the Law a Jealous Mistress"? A striking and well received address was made by Judge James K. Hines of the Supreme Court of Georgia on "Lawyers as Makers and Defenders of the Constitution of the State." L. W. Branch, of Quitman, used as his subject for the President's annual address "The Stagnation of the Criminal Law."

The second day of the session was largely devoted to the consideration by the Association of the Alabama plan for the inclusive organization and incorporation of the Bar. Mr. Borden Burr, of Birmingham, Alabama, addressed the Association at length explaining the Alabama law. The report of the committee upon the incorporation of the bar, recommending the statutory and inclusive organization of the Bar, was adopted, and the incoming president was directed to appoint a committee to draft and submit to the next annual meeting of the Association a bill looking to that end.

The Association also authorized the executive committee of the Association, with the Deans of the Law Schools of Emory, Mercer, and the University of Georgia, to investigate the feasibility of the publication of a Law Journal.

On the last day of the session there was a conference of delegates from Local Bar Associations, presided over by Mr. Paul Doyal, of Rome.

The following officers were elected for the year 1926: Warren Grice, Macon, President; Logan Bleckley, Atlanta, Treasurer; John B. Gamble, Athens, First Vice-President; H. F. Lawson, Hawkinsville, Secretary.

The executive committee is composed of A. W. Cozart, Chairman, Columbus; R. B. Troutman, Atlanta; Henry J. Fullbright, Waynesboro; A. R. Lawton, Jr., Savannah; John S. Wood, Canton.

Harry S. Strozier, for eleven years the Assistant Secretary and Secretary of the Association, because of increased professional duties, asked to be relieved of his office. This the Association did with regret. His geniality and efficiency had endeared him to the entire membership.

H. F. Lawson, Secretary.

Indiana

Thirtieth Annual Meeting of Indiana Bar

The program for the thirtieth annual meeting of the Indiana State Bar Association, at Michigan City on July 8, 9 and 10, presents both variety and interest. It includes an address of welcome by Hon. H. B. Tuthill, Michigan City, and a response by C. C. Shirley, of Indianapolis; the president's address, on "The Progress of the Law," by George Oscar Dix; addresses by Hon. Nicholas Longworth, Paul V. McNutt, and William Draper Lewis. There will be an oration, "The Constitution," by Collier Young, Shortridge High School, Indianapolis, winner of the Indiana State Oratorical contest. It also includes reports of various standing and special committees, among which may be men-

tioned those of the committees on "Invitation of the American Bar Association to Indiana," "Promotion of Passage of Procedural Bill," "Promotion of Bill for Increase of Salaries of Federal Judges," and "Alien Citizenship."

The entertainment program includes a banquet in the main ball room of the Hotel Spaulding, a dinner as guests of the Michigan City Bar Association and Chamber of Commerce, Golfmore Hotel, Grand Beach, and motor trips to Grand Beach and through the newly created Dunes Park, the latter as guests of the Michigan City Bar Association. Special entertainment is provided for the ladies, and its variety bears witness to the activity and efficiency of the entertainment committee.

Iowa

Meeting of Iowa Bar Association

The Thirty-second Annual Meeting of the Iowa State Bar Association was held at Davenport, Iowa, on Thursday and Friday, June 17 and 18, 1926. Although heavy rains the early part of the week prevented many from attending the meeting by reason of bad roads, a total registration of 460 was reached. The meeting will take rank as one of the best of the many splendid meetings held by the Association, the members being royally entertained by the members of Scott County Bar. Every effort was made by the local bar to entertain the members and every courtesy was extended to the lawyers from over the state.

The members of the Association were welcomed to the City of Davenport at the opening session in an Address of Welcome by Mr. C. D. Waterman of the Davenport Bar, the Response being made by Mr. John E. Cross of Newton. The report of the Membership Committee showed an addition of 175 new members, thus keeping the Association in the very forefront of such organizations in point of membership. The report of the meeting of the American Bar Association was given by Mr. Wesley Martin of Webster City, long the Vice-President of the American Bar Association for the State. The President's Address closed the session, being delivered by President J. E. E. Markley of Mason City. The President's subject was "Law Reform" and the presentation of this timely subject was able and fearless. The President's attitude on law enforcement as a means of simplifying the tendency for "cure-all" legislation was heartily endorsed by the members who heard him.

The forenoon session on Thursday was devoted to the presentation and consideration of committee reports, notably the Committee on American Citizenship presented by the Chairman, James A. Devitt of Oskaloosa, and the report of the Committee on Law Reform presented by the Chairman of the Committee, Justice E. A. Morling of Emmetsburg. The Committee on Law Reform presented nine recommendations for amendments to the statutes, six of which were endorsed by the Association. The discussion showed, in a very striking manner, a growing interest of the members in law reform. The Annual Banquet was held at the Masonic Temple on Thursday evening with President J. E. E. Markley as Toastmaster. Splendid responses were made by Mr. J. R. Files of Ft. Dodge upon the subject of "Robinson Crusoe," Hon. M. F. Donegan of Davenport on "The Law and the Profits" and by Justice W. D. Evans of Hampton on "The Bar and the Bench—A Close-Up View." The guests of the Association, Mr. Frederic R. Coudert and Frederic R. Coudert, Jr., of New York City and Chief Justice Carrington T. Marshall of the Supreme Court of Ohio were present at the banquet and responded at the conclusion of the program.

The morning session on Friday was devoted to the reports of various committees of the Association and the general business of the organization, closing with the address of Chief Justice Marshall upon the subject "Modern Progress and Modern Problems." Justice Marshall gave a splendid treatment of the problems affecting present day life and advocated a return to the teachings of the past as the reform to be adopted for the future.

The members of the Association were entertained at a noon-day luncheon by the members of the Davenport Bar Association given at the Davenport Golf and Country Club at noon on Friday. The luncheon was followed by the closing session of the meeting at which the Annual Address was delivered by Frederic R. Coudert of New York. The closing session was held on the grounds of the Golf Club, high on the bluffs of the Mississippi. Here Mr. Coudert addressed the members on the subject "The Evolution of the Doctrine of Territorial Incorporation—Comments upon the Insular Cases." The address was one of the finest in the long list of annual addresses delivered before the Association and consisted of a splendid presentation of the evolution and development of the doctrine of territorial incorporation. The speaker, one of America's great international lawyers, had appeared in all of the insular cases which developed the doctrine formulated by the Supreme Court of the United States. Bearing as it did upon a subject of particular interest at the present, Mr. Coudert's address was of great inspiration and benefit to all who were privileged to hear him.

Officers elected by the meeting to serve for the coming year were as follows: President, B. F. Swisher, Waterloo; Vice-President, H. C. Horack, Iowa City; Librarian, A. J. Small, Des Moines; Secretary-Treasurer, Clyde H. Doolittle, Des Moines.

Iowa City was selected as the next meeting place and the dates for the next annual meeting were set for June 23 and 24, 1927.

CLYDE H. DOOLITTLE, Secretary.

Michigan

Complimentary Dinner to Justice Snow

On May 27, 1926, at the Saginaw Club, a Testimonial Dinner was tended to Justice Ernest A. Snow, of the Michigan State Supreme Court, by the members of the Saginaw County Bar Association, complimenting Justice Snow upon his elevation from the Saginaw, or Tenth Judicial Circuit to the State Supreme Bench. The occasion was extremely significant from the fact that Justice Snow was the first lawyer or jurist from Saginaw County to be called to the State Supreme Bench. The dinner should have been tendered earlier in the winter at the time of Justice Snow's call to this elevated post, but at about this time both of his parents died, and also the Court being in session, it was necessary to defer the dinner until the 27th of May. In attendance at the dinner were a majority of the members of the Supreme Court, and also other leading jurists and lawyers of the State of Michigan. Justice Snow was an able lawyer before going on the bench, and comes from a family of very capable lawyers, his father having been especially recognized as a very capable trial lawyer.

Nevada

Bar President Appoints Committee on Judicial Selection

Hon. Prince A. Hawkins, President of the Nevada Bar Association, has recently appointed a committee on judicial selection composed of Mr. H. R. Cooke, Mr. Sam Platt and Judge George S. Brown. This marks the beginning of activity in Nevada of the Bar Association in connection with the selection of judges. Nothing definite can immediately come of this activity, however, because the bar association will not hold a meeting until after the November, 1926, election. In his letter notifying these gentlemen of their appointment on the committee, President Hawkins called particular attention to section 2 of the Canons of Professional Ethics of the American Bar Association in regard to the duty of the Bar to endeavor to secure the selection of proper judges. He also mentioned the fact that Hon. A. L. Scott, of Pioche, Nevada, had been selected by the chairman of the committee on judicial selection of the Conference of Bar Association Delegates as the delegate from the Nevada Bar Association, who is to work in cooperation with the committee on judicial selection appointed by the President of the Nevada Association from its own members.

New York

Conference of New York Bar Associations

The JOURNAL has received a notice issued by Mr. Philip J. Wickser, President of the Bar Association of Erie County, New York, concerning the conference of all the bar associations of the seventh and eighth judicial districts scheduled for Thursday, June 24th, at Buffalo. "The object of the Conference," as stated by President Wickser, "is to strengthen the bar association idea in western New York, to become better acquainted with each other, and, by common council, to further our common ends and the ideals of the profession. . . . In the belief that interchange of ideas cannot fail to be both beneficial and instructive upon such an occasion, a specific subject, now being considered by the bar throughout the country, has been chosen for debate, namely, 'The

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Proposal for the Incorporation of the Bar.'"

Following is the program as issued:

9:30 a. m.—Organization and election of a chairman and secretary of the conference. Appointment of a committee to consider the advisability of a Federation of Bar Associations of Western New York.

10 a. m.—Debate on the proposal for "The Incorporation of the Bar." Mr. Justice Charles B. Sears will be moderator. Mr. Julius Henry Cohen of New York, Mr. Merritt N. Baker of Buffalo, and either Mr. George H. Bond of Syracuse, or Mr. Richard H. Templeton of Buffalo, will speak in favor of the proposal. Mr. Louis Marshall of New York, Mr. Robert H. Jackson of Jamestown, and Mr. John W. Ryan of Buffalo will speak against it.

12:30 p. m.—Informal luncheon, for delegates and members attending the conference, in the Grill Room, Hotel Statler.

2 p. m.—Continuation of the debate, informally.

3 p. m.—Report of the Committee of Federation of Bar Associations of Western New York, and action thereon.

4 p. m.—Trip to the Outing at the Automobile Club in automobiles.

6:30 p. m.—Informal dinner at the Automobile Club to be followed by a Gridiron and Cabaret Show in charge of the Entertainment Committee.

Pennsylvania

Program for Pennsylvania Annual Meeting

The program for the thirty-second annual meeting of the Pennsylvania Bar Association, at the Bedford Springs Hotel, Bedford Springs, Pennsylvania, on June 29 and 30, and July 1, includes the President's address, by Christian H. Ruhl, of Reading; address by Hon. William Mather Lewis, President of George Washington University, on "Foundations of Good Citizenship"; annual address by Hon. Richard Washburn Child on "Battling the Criminal"; paper by Edgar T. Fell, Assistant Secretary of the American Bar Association, on "State Responsibility." Various important committees will make their reports, among which we note one to inquire into the matter of organization of lawyers of the state into a state bar by incorporating the same; another to consider the creation of a judicial council, and another to present resolutions concerning modernizing and making uniform the procedure of the courts, and to co-operate with the American Bar Association's committee on Uniform Judicial Procedure.

Wisconsin

Annual Meeting of the State Bar Association of Wisconsin

The State Bar Association of Wisconsin closed a successful three day convention at Kenosha on Saturday, June 26th. The convention was opened Thursday afternoon, June 24th, with an eloquent address of welcome delivered by Hon. John C. Slater, President of the local bar association of Kenosha. Roy P. Wilcox, President of the State Association, responded briefly, after which the discussional part of the program was launched by a paper on the subject "Corporate Problems Created by Income Tax Laws," read by Mr. David Himmelblau, C. P. A., Chicago. This was followed by a discussion by the section on Business Organizations, of which Mr. Lecher of Milwaukee is Chairman, giving particular attention to the subjects of Non Par Stock and the Right of Minority Stockholders to Compel Payment of Dividends.

Other subjects discussed during the convention are as follows: "Present Day Crime, Its Prevention and Detection," by Circuit Judge A. H. Reid, Wausau; "Present Day Crime, From the Standpoint of a District Attorney," by Phillip La Follette of Madison; "How to Successfully Conduct a Local Bar Association," by W. P. Knowles, River Falls, E. B. Hand, Racine, and J. G. Hardgrove, Milwaukee; "Preparation and Presentation of a Jury Case for Trial," by Daniel H. Grady of Portage and John F. Baker, Milwaukee.

Justice Walter C. Owen of the Supreme Court, in an interesting talk, gave to the lawyers some excellent pointers on the manner in which cases should be presented to the Supreme Court.

The United States with relation to European affairs was discussed by Circuit Judge R. S. Cowie of La Crosse.

The report of the Committee on Wisconsin Digest was followed by a paper on "How to Use the Wisconsin Digest" by J. C. Cahill of Chicago. The Committee reported in favor of the publication of advance sheets of the Wisconsin Supreme Court Decisions and the Association voted unanimously as favoring such a publication.

The Association listened with pleasure to interesting and instructive addresses by Chief Justice Carrington T. Marshall of the Ohio Supreme Court on the subject "Our Institutions on Trial," and by ex-Senator Chester I. Long, President of the American Bar Association, on the subject "Liberty With Government."

In his annual Presidential address, Mr. Wilcox took up the subject of the growth of the Association, its possible future, and the work before it of building up the ethical standards of the legal profession. His address had the merit of being not only interesting but brief and to the point, and was well thought out.

Many interesting and constructive committee reports were submitted, among which that of the Membership Committee is deserving of special mention. Such Committee reported that under the affiliation plan, which has been in force for the past two years, eleven county associations had voted to affiliate. Among these was Milwaukee, by far the largest local association in the state. By reason of such affiliations, the Association has grown during the past year from a membership of 800 to nearly 1,300, a gain of over 60 per cent, and embracing over 65 per cent of the lawyers of the State. This indicates a very rapid and healthful growth on the part of the State Association and it is hoped that it may continue until it includes the entire state.

Too much cannot be said for the splendid manner in which the visiting members were entertained by the Kenosha County Bar Association, under the direction of Clifford E. Randall, chairman of the Committee on Local Arrangements. The State Association enjoyed the splendid new Elks Club House for its use as headquarters and for most of its meetings. A reception and luncheon were given by the local association at such club house on Thursday evening. On Friday noon, the entire Association adjourned to the Kenosha Country Club where they were served a splendid luncheon and, after a short session, the members were permitted the free use of the golf grounds and other recreational facilities of the club. The visiting ladies of the State Association were generously entertained by the wives of the Kenosha County lawyers. The meeting closed with a banquet given at the Elks Club where special entertainment was provided.

The Constitution and by-laws were amended so as to provide for a new standing committee on Judicial Selection, whose Chairman will be a member of the Executive Committee, and the Executive Committee was further enlarged by providing that the retiring President should be a member thereof for a period of one year. Provision was also made for payment of the traveling expenses of members of the Executive Committee incurred in attending meetings of the Committee.

The following officers were elected: President, Marvin B. Rosenberry, Madison; Vice Presidents, 1st Circuit, Clifford E. Randall; 2nd, Edwin S. Mack, Milwaukee; 3rd, George Hilton, Oshkosh; 4th, A. L. Hougen, Manitowoc; 5th, W. R. Graves, Prairie du Chien; 6th, Jesse Higbee, La Crosse; 7th, William E. Fisher, Stevens Point; 8th, W. G. Haddow, Ellsworth; 9th, C. E. Blake, Madison; 10th, Thomas H. Ryan, Appleton; 11th, W. N. Fuller, Cumberland; 12th, Otto Oestreich, Janesville; 13th, Harvey J. Frame, Waukesha; 14th, Walter T. Bie, Green Bay; 15th, Allan Pray, Ashland; 16th, A. H. Reid, Wausau; 17th, W. J. Rush, Neillsville; 18th, H. Ryan Duffy, Fond du Lac; 19th, Alex Wiley, Chippewa Falls; 20th, Max Sells, Florence; Secretary and Treasurer, Gilson G. Glasier, Madison; Assistant Secretary, Arthur A. McLeod, Madison.

Committee on Necrology and Biography, Archie McComb, Green Bay, Chairman; Publication Committee, Carl B. Rix, Milwaukee, Chairman; Committee on Judicial Selection, George Williams, Oshkosh, Chairman.